Comptroller for Specialized Examinations, and Richard H. Neiman, Staff Attorney.

RESCISSION OF RULE

§§ 9.101-9.104 [Rescinded]

12 CFR Part 9 is amended by rescinding §§ 9.101, 9.102, 9.103, and 9.104.

Dated: May 30, 1978.

JOHN G. HEIMANN,
Comptroller of the Currency.

[FR Doc. 78-15394 Filed 6-1-78; 8:45 am]

[3510-25]

Title 15—Commerce and Foreign Trade

CHAPTER III—INDUSTRY AND TRADE ADMINISTRATION, DEPARTMENT OF COMMERCE

PART 315—DETERMINATION OF BONA FIDE MOTOR-VEHICLE MANUFACTURER

Change in Nomenclature

AGENCY: Industry and Trade Administration, Department of Commerce.

ACTION: Final rule.

SUMMARY: This rule redesignates organizations and officials in accordance with the reorganization effective on December 4, 1977. The content of Part 315 will remain the same as before.

EFFECTIVE DATE: December 4, 1977.

FOR ADDITIONAL INFORMATION CONTACT:

Thomas C. Meehan, Office of Producer Goods, Industry and Trade Administration, Department of Commerce, Washington, D.C. 20230, 202-377-4816.

Accordingly, Part 315 is amended as follows:

1. All references to "Domestic Commerce" throughout Part 315 are modified to read "Domestic Business Development".

2. In § 315.3 reference to "Form DIB-964" is modified to read "Form ITA-964"; reference to "OBRA" is modified to read "OPG".

ROBERT E. SHEPHERD,
Deputy Assistant Secretary for Domestic Business Development.

[FR Doc. 78-15395 Filed 6-1-78; 8:45 am]

[6820-27]

Title 16—Commercial Practices

CHAPTER I—FEDERAL TRADE COMMISSION

[Docket 8855-o]

PART 13—PROHIBITED TRADE PRACTICES AND AFFIRMATIVE CORRECTIVE ACTIONS

The Coca-Cola Co., et al.

Correction

In FR Doc. 78-13289 appearing at page 20967 of the issue of Tuesday, May 16, 1978, on page 20968 in the second column under paragraph A. the word "product" in the eleventh line should be changed to "production".

[6820-27]

[Docket 8856-o]

PART 13—PROHIBITED TRADE PRACTICES AND AFFIRMATIVE CORRECTIVE ACTIONS

PepsiCo, Inc.

Correction

In FR Doc. 78-13290 appearing at page 20969 of the issue of Tuesday, May 16, 1978, at page 20969 in the third and fourth lines of paragraph C. At the bottom of the third column, the word "consented" should be inserted between "license" and "to".

[6750-01]

[Docket C-2922]

PART 13—PROHIBITED TRADE PRACTICES, AND AFFIRMATIVE CORRECTIVE ACTIONS

Performance Sailcraft, Inc.

AGENCY: Federal Trade Commission.

ACTION: Order to cease and desist.

SUMMARY: In settlement of alleged violations of Federal law prohibiting unfair acts or practices and unfair methods of competition, this consent order, among other things, requires a Pointe-Claire, Quebec, Canada, manufacturer and distributor of fiberglass sailboats and accessories to cease entering into or enforcing any form of agreement with its dealers concerning the retail price of its products; restricting territories in which its dealers may advertise or sell its products; and terminating or threatening to terminate dealers who do not follow its pricing and territorial instructions. Further, any future price lists distributed by the firm must note that the prices are suggested or approximate.

DATE: Complaint and order issued May 2, 1978.[1]

FOR FURTHER INFORMATION CONTACT:

Alfred F. Dougherty, Jr., Director, Bureau of Competition, Federal Trade Commission, 6th and Pennsylvania Avenue NW., Washington, D.C. 20580, 202-523-3601.

SUPPLEMENTARY INFORMATION: On Friday, May 27, 1977, there was published in the FEDERAL REGISTER, 42 FR 27255, a proposed consent agreement with analysis in the matter of Performance Sailcraft, Inc., a corporation, for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions, or objections regarding the proposed form of order.

No comments were received, and the Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered its order to cease and desist, as set forth in the proposed consent agreement, in disposition of this proceeding.

The prohibited trade practices and/or corrective actions, as codified under 16 CFR 13, are as follows:

Subpart—Coercing and Intimidating: § 13.358 Distributors. Subpart—Combining or Conspiring: § 13.395 To control marketing practices and conditions; § 13.425 To enforce or bring about resale price maintenance; § 13.430 To enhance, maintain, or unify prices; § 13.470 To restrain or monopolize trade; § 13.497 To terminate or threaten to terminate contracts, dealings, franchises, etc. Subpart—Corrective Actions and/or Requirements: § 13.533 Corrective actions and/or requirements: § 13.533-45 Maintain records. Subpart—Cutting Off Access to Customers or Market: § 13.560 Interfering with distributive outlets. Subpart—Cutting Off Supplies or Service: § 13.610 Cutting off supplies or service; § 13.655 Threatening disciplinary action or otherwise. Subpart—Maintaining Resale Prices: § 13.1145 Discrimination: § 13.1145-5 Against price cutters; § 13.1145-20 Distributive channels and outlets generally; § 13.1155 Price schedules and announcements; § 13.1165 Systems of espionage; § 13.1165-80 Requiring information of price cutting; § 13.1165-90 Spying on and reporting price cutters, in general.

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[1] Copies of the complaint and the decision and order filed with the original document.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45.)

CAROL M. THOMAS,
Secretary.

[FR Doc. 78-15370 Filed 6-1-78; 8:45 am]

[6750-01]

SUBCHAPTER D—TRADE REGULATION RULES

PART 456—ADVERTISING OF OPHTHALMIC GOODS AND SERVICES

AGENCY: Federal Trade Commission.

ACTION: Final Trade Regulation Rule.

SUMMARY: The Federal Trade Commission issues a final rule which preempts state laws which either prohibit or burden the advertising of prescription eyewear or eye examinations. The rule also prohibits restrictions on advertising of this type imposed by private groups such as trade associations. Finally, the rule requires that consumers be provided with copies of their prescriptions after they have their eyes examined. The Commission is taking this action because of a staff investigation which highlighted an inadequacy of consumer information disclosure in the retail ophthalmic market.

EFFECTIVE DATE: July 3, 1978.

FOR FURTHER INFORMATION CONTACT:

Terry S. Latanich, Gary D. Hailey, Scott P. Klurfeld, Federal Trade Commission, 6th Street and Pennsylvania Avenue NW., Washington, D.C. 20580, 202-523-3426.

SUPPLEMENTARY INFORMATION:

STATEMENT OF BASIS AND PURPOSE

A. ANALYSIS OF THE RECORD EVIDENCE

1. *Introduction.* On September 16, 1975, the Federal Trade Commission directed its staff to examine the adequacy of information disclosure in the retail ophthalmic market.[1] The staff, in the course of this investigation, made comprehensive surveys of state occupational licensing laws, and of private associational codes of practice which govern those who dispense prescription eyeglasses. Numerous comments were received from various interested persons: industry members, state occupational licensing boards, other state officials, state and national professional associations, and consumer groups.[2]

Following this investigation, the Commission on January 16, 1976, proposed a trade regulation rule which would eliminate restraints placed by states and private associations on the dissemination of information concerning ophthalmic goods and services, thereby permitting sellers to advertise.[3] The Commission indicated in the proposed rule that it might require ophthalmologists and optometrists to release prescriptions to their patients so that consumers would be able to price shop. In addition, the FEDERAL REGISTER notice containing the proposed rule specifically questioned whether the scope of the rule should be expanded to include the advertising of eye examinations.[4]

The scope of the informal oral hearings in this matter was focused through the publication of a second FEDERAL REGISTER notice setting forth designated issues.[5] One of these designated issues was whether the coverage of the rule should include the advertising of examination services.[6]

Throughout the proceeding the staff attempted to maximize the awareness and participation of state officials because the proposed rule would preempt state law. Written comments were received from many officials, and 31 state and local government representatives gave testimony at the public hearings.[7] Consumer groups, economists, optometrists, opticians, and to a lesser degree ophthalmologists also participated. In addition over 1,000 written comments were received from consumers.[8]

At the conclusion of the rulemaking hearings the presiding officer published a report containing his findings and conclusions. In that report the presiding officer recommended that the Commission promulgate a final rule.[9]

Based on its analysis of the evidentiary record, the staff recommended that the Commission promulgate a trade regulation rule which would allow the advertising of ophthalmic goods and services.[10] After reviewing the record in this proceeding and hearing oral presentations from both industry and consumer representatives, the Commission has voted to promulgate a final rule which would allow advertising of eye examinations as well as advertising of ophthalmic goods and services.

2. *Background. Industry Importance:* Ophthalmic goods and services are used by over 50 percent of the United States population. In 1975 over 112,000,000 people used corrective lenses, and consumers spent approximately $4.1 billion in this industry that same year.[11] The frequency of use of ophthalmic goods, however, is not evenly distributed over all groups and classes of persons.

A 1974 survey determined that use of prescription lenses increases with age. While persons 45 and older made up only 31 percent of the population in 1974, they purchased 59 percent of all corrective lenses. Similarly, the proportion of people using eyeglasses varies in age: ages 24-45, 41.9 percent used eyeglasses; ages 45-64, 88 percent; over age 65, 93 percent.[12]

Other studies have indicated that the use of eyeglasses varies with income. The income level of a family group is positively correlated with eyeglass use; higher income families are able to purchase eyeglasses more frequently.[13] Among youths the need for glasses and the need for a change of existing prescriptions is substantially

[1] Federal Trade Commission (Bureau of Consumer Protection), *Staff Report on Advertising of Ophthalmic Goods and Services and Proposed Trade Regulation Rule* (1977), Exhibit XIII-2, at 1. (hereinafter cited as "Staff Report").

[2] Categories VIII, IX, and X of the Public Record (215-52).

[3] 41 FR 2399 (1976).

[4] Id. at 2401, question 7.

[5] 41 FR 14,194 (April 2, 1976).

[6] Id. at 14,196, question 7.

[7] See Staff Report at 2. Hearings were held in Washington, D.C., Cleveland, Ohio; New York, N.Y.; San Francisco, Calif.; Dallas, Tex. See publication notice in 41 FR 14,194 (1976).

[8] See Staff Report at 3.

[9] *Report of the Presiding Officer on Proposed Trade Regulation Rule Regarding Advertising of Ophthalmic Goods and Services* (1977), Exhibit XIII-1. (Hereinafter cited as "Presiding Officer's Report")

[10] See Staff Report at 3.

[11] Gordon R. Trapnell Consulting Actuaries, *The Impact of National Health Insurance on the Use and Spending for Sight Correction Services* (1976), Exhibit II-68, at Record 1968 (hereinafter the Record is cited as "R."). See Staff Report at 121.

[12] Public Health Service, National Center for Health Statistics, DHEW, *Characteristics of Persons with Corrective Lenses—United States*, 1971, Series 10, No. 93 at table 1, p. 10 and 16. See Trapnell Study, supra note 11 at table 9; Transcripts, *California Attorney General's Fight Inflation Committee Hearings* (1975), Exhibit IV-141, at R. 5963; Report and Recommendation of the California Attorney General's Inflation Committee, March 1975; "Advertising the Price of Eyeglasses—Majority Report" and "Minority Report on Advertising the Price of Eyeglasses," Exhibit IV-133, at R. 5762. See also Staff Report at 122.

[13] Gordon R. Trapnell, supra note 11 at R. 1971. See Comment Cyril C. Tulley, Exhibit VII-303, at R. 13011; *Expenditures for Personal Health Services—National Trends and Variations*, 1953-1970, DHEW Publication No. (HRA) 74-3105 (Oct. 1973), Exhibit III-5; Comment of Nancy C. Bilello, Exhibit VII-341, at R. 13053; Douglas Coate, *Studies in the Economics of the Profession of Optometry*, CCNY Univ. Microfilms, No. 74-20 (1974), Exhibit V-5, at R. 6300. See also testimony of John Collins, Chairman, Health Care Task Force, North Jersey Federation of Senior Citizens, Transcript 2430 at 2431-32 (hereinafter transcript cited as "Tr."); Staff Report at 123.

greater for those in lower income families.[14] Thus, the rule will affect a large number of consumers, especially those who are most vulnerable: the elderly and the poor.

Industry structure: The ophthalmic industry consists of three levels: (1) Manufacturers of frames and lenses; (2) wholesale laboratories which distribute manufactured goods and fabricate completed eyeglasses; and (3) retailers, including ophthalmologists, optometrists, and opticians, who dispense the finished product to consumers.[15] The Rule is basically concerned with unfair acts and practices occuring at this third stage.

Opthalmologists are licensed physicians who diagnose and treat all conditions relating to the eye, including visual problems. They also may perform surgery, and prescribe drugs and corrective lenses.[16] In 1975 they performed 43 percent of all eye examinations in the United States, and dispensed over 10 percent of all corrective lenses.[17]

Optometrists are licensed practitioners who specialize in problems of human vision. They perform eye examinations and are able to prescribe and adapt lenses or or other optical aids to preserve or restore maximum visual efficiency.[18] They are trained to detect eye diseases, but are not permitted to make definite diagnoses, perform surgery or prescribe drugs.[19]

Optometrists outnumber ophthalmologists almost two-to-one, with approximately 20,000 in active practice in 1975. They are the major retail providers of eye care goods and services, performing 57 percent of all eye exams in 1975. In that year they also dispensed 49 percent of the total corrective lenses sold at retail.[20] Most optometrists charge at cost for ophthalmic goods; they derive their income from examination and dispensing fees.[21] It should be noted though that although many optometrists dispense ophthalmic goods at "cost", the attendant "dispensing fee" for dispensing the ophthalmic goods makes the net effect on the consumer the same as if the goods had simply been "marked up."

Opticians, the third type of practitioner, supply consumers with eyeglasses on the written prescription of ophthalmologists and optometrists. They do not examine or treat the eyes, nor do they perform refractions or prescribe lenses; rather, they share the dispensing functions with the other two groups. Since most optometrists dispense eyeglasses to their patients, opticians' primary source of customers consist of patients of non-dispensing ophthalmologists.[22] There were an estimated 10,500 active opticians in 1975, many working in small retail establishments. Approximately 41 percent of corrective lenses were dispensed by opticians in 1975.[23]

The three groups of practitioners have historically fought over their proper roles because of this high degree of functional overlap. Ophthalmologists have opposed the expansion of optometrists into traditional medical functions such as examining for pathology or using drugs to diagnose diseases.[24] Optometrists counter that they can detect eye and other diseases and therefore provide a valuable public service by offering a "point of entry" into the health care system. They argue that they can diagnose patients with problems other than those affecting vision and refer them to appropriate medical practitioners.[25]

Optometrists and opticians, on the other hand, are in direct competition at the retail level of dispensing. The optometrists have a distinct advantage in this competition since they can offer one-stop service; and examination and the actual dispensing. Optometrists have consistently resisted attempts by opticians to expand their professional role into other areas, such as determining the proper form or design of a patient's eyeglass lenses, or the dispensing of contact lenses.[26] Opticians answer that they are qualified to perform such services, and that it is because of optometry's opposition that they have not been able to gain state licensing which would assure uniform qualifications.[27]

It might be assumed that this interprofessional rivalry would enhance competition among providers of eye care, and thereby benefit consumers. Widespread restrictions on advertising by these groups, however, has severely hampered their ability to inform consumers of their respective qualifications, services, and prices. The potentially beneficial effects of such interprofessional rivalry are substantially diminished by the fact that consumers lack the basic informational tools to discern the various marketplace alternatives.[28]

3. *Prevalence of Advertising Bans.* Restrictions on the advertising of ophthalmic goods and services emanate from a complex web of state and private regulation of the providers of eye care: ophthalmologists, optometrists, and opticians. Professional associations, through their codes of ethics, rules of practice, membership requirements, and informal pressures, reinforce existing legal restraints and often suppress advertising even where it is legally permitted.

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[14] "Eye Examination Findings Among Youths Ages 12-17 Years, United States," DHEW Publications No. (HRA) 76-1637, Hearing Exhibit 116 (hereinafter cited at "HX") at 16, 18. See Staff Report at 124-25.

[15] See Staff Report at 11-32

[16] National Center for Health Statistics, Health Resources Statistics, U.S. DHEW (1974), Exhibit II-18, at R. 636. In addition to eye diseases, ophthalmologists also examine the eye for symptoms of disease elsewhere in the body. American Association of Ophthalmology, "What Is An Ophthalmologist?" (1965), HX 281 Attachment 5. See Staff Report at 15-16

[17] Gordon R. Trapnell Consulting Actuaries, supra note 11 at R. 1967. See Staff Report at 17.

[18] *Health Resources Statistics*, supra note 16. See Staff Report at 17-18.

[19] Id.; *Synopsis of Education for the Health Professions*, Committee of Presidents of the Health Professions Educational Associations of the Association for Academic Health Centers (Washington, D.C.) at 26. One state, West Virginia, permits optometrists to use drugs for both therapeutic and diagnostic purposes. *American Optometric Association News*, Vol. 16, No. 7 (April 1977), at p. 7. See Staff Report at 18-19.

[20] Gordon R. Trapnell Consulting Actuaries, supra note 11 at R. 1964, 1967. See Staff Report at 19-20.

[21] See, e.g., "First Annual Practice Management Survey," *Optical Journal and Review of Optometry*, Vol. 113, No. 2 (February 15, 1976), Exhibit VI-44, at R. 12547; letter to FTC from J. Harold Bailey, Executive Director, American Optometric Association, (November 15, 1975), Exhibit IV-53 at R. 2553; testimony of James W. Clark, Jr., Executive Director, Kansas Optometric Association, Tr. 4272 at 4294. See also Staff Report at 20-21.

[22] See Better Vision Institute, Inc., "Facts You Should Know About Your Vision," *New York Times*, Jan. 9, 1971 (Advertising Supplement), at 2; Opticians Association of America, "A Task Analysis of the Dispensing Optician," HX 309; letter to FTC from J. A. Miller, Executive Director, Opticians Association of America (Oct. 17, 1975), Exhibit IV-55, at R. 2912. See also Staff Report at 22-25.

[23] Gordon R. Trapnell Consulting Actuaries, supra note 11 at R. 1962, 1966, 1967. See also Staff Report at 25-26.

[24] See, e.g., Robert W. Wolmoth, *A Statement on the Future of Ophthalmology* (1975), Exhibit II-28, at R. 792; David W. Shaver, "Opticianry, Optometry, and Ophthalmology: An Overview," *Medical Care*, Vol. XII, No. 9 (1974), Exhibit II-21, at R. 708, 711-713. Mosely H. Winkler, M.D., "We're Surrendering our Patients to Nonphysicians," *Medical Economics* (August 23, 1976), at 74-79. See also Staff Report at 26-28.

[25] See, e.g., testimony of Ron G. Fair, President, American Optometric Association, Tr. 4638 at 4669-73. See also Staff Report at 28-29.

[26] See, e.g., letter to FTC from J. A. Miller, Executive director, Opticians Association of America (Oct. 30, 1975), Exhibit IV-55, at R. 2913-14; testimony of Ron G. Fair, President, American Optometric Association, Tr. 4638 at 4747; Florida State Board of Optometry v. Miami-Dade Optical Dispensary, No. 74-24358 (Fla. Cir. St., Dade Co., June 3, 1976). See also Staff Report at 29-30.

[27] See, e.g., Statement of California Association of Dispensing Opticians, HX 286; rebuttal submission of Opticians Association of America, Exhibit IX-180, at R. 17366; 17368; comment of Al Schleuter, Warson Optics, Exhibit VIII-126, at R. 14536; testimony of Kenneth R. Davenport, President, South Carolina Association of Opticians, Tr. 6182 at 6192-93. See also Staff Report at 30-31.

[28] See Staff Report Section II. This lack of consumer knowledge is discussed further in Section 5 of this Statement of Basis and Purpose.

The net effect of the advertising restrictions pertaining to optometrists and opticians[29] as of May 1, 1977, is as follows:

(1) In 19 states,[30] No price advertising of eyeglasses is permitted, by virtue of the legal restraints pertaining to both optometrists and opticians;

(2) In 17 states,[31] price advertising by opticians is permitted, but is prohibited for optometrists;

(3) In 2 states,[32] price advertising by one practitioner group is prohibited, and by the other group is partially restricted;

(4) In 5 states,[33] price advertising by both groups is partially restricted;

(5) In 2 states,[34] price advertising by opticians is permitted, but by optometrists is partially restricted;

(6) In 6 states, unrestricted price advertising by both optometrists and opticians is legally permitted; however, optometrists who are members of the respective state associations in those states where price advertising is legally permitted are nevertheless prevented from disseminating price information by privately-imposed codes of ethics and other membership requirements.[35] In addition, private bans on advertising are frequently found in the by-laws of state and national associations of optometrists, ophthalmologists and opticians.[36]

The impetus for regulation has come from within the industry itself, in part as a response to perceived advertising abuses[37] but also as a means to eliminate the economic threat posed by free competition.[38] The presiding officer concluded: "that these restraints were enacted into state laws and regulations * * * at the insistence of optometrists cannot be challenged."[39]

Although the landmark Supreme Court decisions in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*[40] and *Bates* v. *State Bar of Arizona*[41] have established some measure of first amendment protection for commercial speech, they have not addressed many issues raised by this rule, such as the extent to which affirmative disclosure requirements may hinder or facilitate the flow of truthful information to consumers. In fact, the rule complements these decisions by helping to insure that their objectives are carried out.

4. *The Economic Effects of Advertising Restraints on Consumers.* The evidence available at the time this rule was proposed indicated that a wide range of prices existed within many jurisdictions for comparable prescription eyewear.[42]

The initiation of the rulemaking proceedings spurred several consumer groups and others to undertake an assortment of price surveys. A single theme predominates throughout all of the surveys performed: prices for lenses, frames, or complete eyeglasses vary as much as 100 percent to 300 percent from seller to seller.[43]

Critics of these studies charge that the studies failed to control for the variability of the frame or prescription, the quality of the goods provided, or variations in the associated professional services offered by the seller.

But none of these criticisms rebuts the finding that prices for relatively homogeneous ophthalmic goods and services do in fact vary widely. In those instances in which prices were quoted for a specific frame and prescription, the survey results conclusively demonstrated the wide range of available prices.[44] Survey data indicating that the lowest-priced sellers used the same sources of lenses as the high-priced sellers[45] refutes the critics' claim that price variations are the product of quality variations (as do those surveys finding a wide range of prices quoted for a particular eyeglass frame.)

Thus, the available evidence shows that prices for ophthalmic goods are highly variable. Moreover, it indicates that consumers are not aware of the range of price alternatives.[46] Accordingly, the Commission finds that significant consumer loss has occurred and continues to occur because of these factors.

A substantial body of economic theory and evidence indicates that wide price variations for relatively homogeneous goods are characteristic of a market in which there is inadequate information. The lack of adequate information can occur not only because the dissemination of information is prevented by restraints on advertising, but because rational consumer behavior suggests that for infrequent purchases of the kind involved here, consumers are less likely to seek out information from sources other than advertising than they would be for commodities more frequently purchased or for those involving larger expenditures.[47] The introduction of information by those who are able to do so most efficiently (i.e., sellers) tends to (1) decrease consumer search costs and (2) force sellers to become more price conscious and price competitive.

Even where the benefits of advertising are not always immediately measurable in terms of actual price reductions, the ability to economize on search costs is a genuine, independent consumer benefit.[48]

In a market in which the normal channels of commercial communica-

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[29]This ranking excludes ophthalmologists, since as a practical matter they do not advertise even in those states where they are not legally constrained from so doing.

[30]Alaska, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Wisconsin, and Wyoming.

The state statutes, board regulations, and association codes of ethics pertaining to optometrists and opticians are contained in Exhibits IV-1 through IV-51 of the record, except for recently enacted laws and rules which were promulgated after the written record was closed. Many of those new statutes and regulations were submitted as exhibits to witnesses' testimony, and may be found in the record under category XII.

[31]Alabama, Arkansas, Delaware, Florida, Georgia, Idaho, Kansas, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, South Dakota, Tennessee and Vermont.

[32]Connecticut and Washington.

[33]Massachusetts, New York, Ohio, Texas and Virginia.

[34]Utah and West Virginia.

[35]Arizona, California, Colorado, District of Columbia, Iowa and Maryland.

[36]See Staff Report at 68-77 for a full discussion of the scope and nature of private bans, which vary considerably for the three practitioner groups.

Ophthalmologists, as physicians, may belong to the American Medical Association (AMA), as well as their own specialty association, the American Association of Ophthalmology (AAO), and state affiliates of these organizations. The AAO has no codes or rules governing the conduct of members insofar as advertising is concerned. The AMA's Principles of Medical Ethics state that a physician should not solicit patients; what constitutes solicitation has been elaborated upon by the AMA. See Staff Report at 69-71.

The American Optometric Association is the major national association of optometrists. Until recently, it had a clear national policy against price advertising by its members. Its present stated policy, however, is to defer to its state affiliates to set standards with respect to advertising. Many state associations do explicitly condemn advertising, including the associations in five of the six states where it is legally permitted. See Staff Report at 71-76.

The major national association of opticians, the Opticians Association of America, has no stated policy against advertising by its members, and few state affiliates condemn it. Although there appears to be considerable debate among individual opticians about the propriety of advertising, organized opticianry as a whole has neither condemned nor condoned advertising. See Staff Report at 76-77.

[37]See Staff Report at 46-47.

[38]Id. at 48-52.

[39]*Presiding Officer's Report*, Exhibit XIII-1 at 59.

[40]425 U.S. 748 (1976).

[41]433 U.S. 350 (1977).

[42]See Staff Report at 79-88.

[43]See Staff Report at 79-81, n. 2.

[44]See, e.g., Terry Freeman, *Survey of Eyeglass Prices in Ohio*, Ohio Health and Retirement Committee, HX 139; Delia Schletter, *Optical Illusion: A Consumer View of Eye Care*, San Francisco Consumer Action (1976), Exhibit II-65, at R. 1526.

[45]Id. at 1613.

[46]See Staff Report, Section IV(B).

[47]See Staff Report at 35-51, and 90.

[48]Testimony of David G. Tuerck, Director, Center for Research on Advertising, American Enterprise Institute, Tr. 13 at 17.

tion have been closed, consumer search is difficult or impossible. Advertising facilitates consumer search.[49] By providing the consumer information concerning product, price and performance characteristics, advertising helps the consumer to assess product differences and make a rational purchase decision. And for some groups, such as the aged, the absence of advertising imposes virtually insurmountable obstacles to effective search in the ophthalmic market.[50]

Therefore, allowing advertising will provide consumers with at least some of the information necessary for comparison shopping, thereby reducing search costs.

Price advertising serves to reduce mean prices by informing the public of price alternatives (so that a greater percentage of the public will purchase from sellers who offer lower prices) and by inducing greater price competition among sellers (resulting either in reduced prices or deterrence of future price increases). A number of studies in other product fields lend support to these conclusions.[51] Most of the surveys of prescription eyeglass prices introduced into the record, while not purporting to demonstrate a causal relationship between advertising and prices, tend to show that prices are lower in states that permit advertising. In addition, the reported experiences of retail chains and numerous consumers bear witness to the fact that price differentials exist across state lines and correlate with advertising bans.[52]

Two surveys conducted by Professor Lee Benham of Washington University sought to analyze the impact of information restraints on eyeglass prices.

In his first study, Benham compared prices paid for eyeglasses, in those states which had complete advertising prohibitions with prices charged in states which had no restrictions.[53] Data on prices was obtained from a 1964 survey of 634 persons in 23 states. Benham found that the mean price for eyeglasses in states with restraints on advertising was 25 percent higher than in states where advertising was permitted.[54] Comparing the most restrictive states with the least restrictive states, he found that mean costs differed by more than 100 percent.[55] By the use of regression analysis, Benham demonstrated a positive correlation between the difference in prices and the presence or absence of advertising restraints.[56]

Benham's second study investigated the proposition that more stringent professional control of the types and quantity of information leads to restraints on the usual flow of commercial information, thereby decreasing competition and increasing prices.[57] Benham constructed three indices which reflected alternative but interrelated approaches for examining the impact of professional control on the market,[58] and also considered other associated factors and variables which affect eyeglass prices or consumption.[59] All three indices were found to be strongly associated with prices paid. Prices increase as membership in the American Optometric Association increases. The mean price increases as the proportion of eyeglasses purchased from "professional" sources rather than "commercial" sources increases. And since the proportion of individuals obtaining eyeglasses is directly related to the price of glasses, the indices of professional control are likewise strongly associated with the frequency with which eyeglasses are purchased.[60]

This second study also found that, where multiple purchases of eyeglasses are included, demand for eyeglasses is elastic.[61] That is, the percentage decrease in price is less than the percentage increase in demand, resulting in an increase in total expenditure. In addition, some economies of scale on material purchases may be realized by high-volume retail sellers. Therefore, the increased per-unit cost attributable to advertising expenses could be more than offset by increased sales volumes and by the economies of scale associated with such high sales volume.[62]

A study funded by the American Optometric Association critiqued the Benham studies.[63] Although this critique does raise some methodological questions, the Commission agrees with the Presiding Officer[64] that the Benham data is reliable and in conjunction with the other economic evidence provides a sound empirical base on which to promulgate this rule.

Another significant price comparison survey was conducted by San Francisco Consumer Action (SFCA), funded by the FTC's public participation program.[65] Price quotations for ophthalmic lenses, complete pairs of eyeglasses, and contact lenses were collected in California in the summer of 1975, at a time at which price advertising was not permitted in that state. Similar price quotations were obtained a year later in Arizona a state where price advertising is allowed.[66]

The data from this survey (adjusted to control for the time-lag variable) demonstrates that prices in Arizona are from 4.2% to 41.7% lower than those in California.[67]

Because SFCA concluded that there was very little price advertising occurring in Arizona at the time of their survey, the question arises as to whether the lower prices are attributable to price advertising. Other economists, however, have testified that the ability to price advertise, even in the absence of actual advertising, might serve to deter sellers from raising prices because of the threat of potential price advertising.[68] SFCA noted that as recently as five years ago price advertising was very prevalent in Arizona and that there were large "price wars" as recently as two or three years ago.[69]

Economic theory teaches that continued price advertising could be used to attract customers away from those who raise their prices.[70] The observed pattern in Arizona of a period of heavy price advertising and price wars followed by limited price advertising and a consequently lower-priced market is consistent with this economic model. This evidence leads to the conclusion that the lower prices in Arizona can be attributed, at least in part, to price advertising.

5. *Advertising bans and consumer knowledge.* This trade regulation rule is premised in part on the finding that adequate information is not present in the ophthalmic market to allow consumers to make intelligent and informed purchase decisions.

Professional associations challenged this premise, arguing that adequate information is available to consumers.[71]

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[49] See, e.g., George Stigler, "The Economics of Information," *The Organization of Industry* (1968) at 186-87.

[50] Testimony of Donald F. Reilly, Deputy Commissioner on Aging, DHEW, Tr. 111 at 114.

[51] See Staff Report at 93-95.

[52] Id. at 96-97, n. 58.

[53] Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. L. & ECON. 337 (1972), Exhibit V-1, R. 6216.

[54] *Id.* at R. 6222.

[55] *Id.*, tables 1 and 2 at R. 6220-22.

[56] *Id.* at R. 6227.

[57] Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J. L. & ECON. 421 (1975), Exhibit V-2, R. 6232.

[58] *Id.* at 6235-38.

[59] *Id.* at 6241-46.

[60] *Id.* at 6241-51.

[61] *Id.*

[62] *See* Staff Report at 115-17.

[63] Testimony of John Burdeshaw, Southern Research Institute, Tr. 5712 at 5713; Southern Research Institute, *The Advertising of Ophthalmic Goods and Services: An Economic and Statistical Review of Selected FTC and Related Documents*, Report to the AOA, Project 3692 (1976), HX 356.

[64] *Report of the Presiding Officer*, Exhibit XIII-1 at 45.

[65] Delia Schletter, *There's More Than Meets the Eye*, San Francisco Consumer Action (1976), HX 397.

[66] Testimony of Delia Schletter, San Francisco Consumer Action, Tr. 6297 at 6440.

[67] See Staff Report, Table 3-1 at 98.

[68] *See, e.g.*, testimony of David G. Tureck, *supra* note 48 at 17.

[69] Testimony of Delia Schletter, *supra* note 65 at 6430.

[70] Testimony of David G. Tureck, *supra* note 48 at 17, 28.

[71] *See* materials cited in Staff Report at 126-27, n. 21.

But a survey of practicing AOA members conducted by the AOA itself found that over 55% of those optometrists expressing an opinion indicated their belief that consumers do not have enough information available to them to select the ophthalmic goods and services which best meet their budgets and needs.[72]

Measured from the perspective of the consumer, the lack of consumer knowledge becomes even more apparent. Pursuant to a grant in accordance with Section 1.17 of the FTC's Rules of Practice, California Citizen Action Group (CCAG) performed a survey of consumer knowledge and attitudes.[73]

The first portion of the CCAG study focused on the consumers' own assessments of their knowledge of the eye care field. Most consumers considered themselves relatively uninformed about the quality of materials used in eyeglasses, eyeglass and frame prices, and examination fees. The poor ranked themselves as "totally uninformed" almost twice as often as did the non-poor.

Another aspect of the CCAG study was the measurement of actual consumer awareness. Researchers questioned consumers as to the roles and functions of ophthalmologists, optometrists, and opticians. In the critical areas of which professionals could or could not diagnose eye disease, treat eye diseases, and prescribe medication, consumers frequently were confused. The most significant finding was the consumers' inability to distinguish among the types of "examination" or "service" performed by the three classes of practitioners. Again, the poor are less likely to be knowledgeable about such matters than are the non-poor.[74]

Therefore, the absence of information in the market has created a situation of high relative consumer misinformation. Advertising clearly holds the potential to educate the public in many of the above-noted areas. The CCAG study attempted to determine the impact of additional information in the market on consumer knowledge. After receiving information about methods and costs of eyeglass fabrication, consumers became more receptive to the concept of comparision shopping for eyeglasses and showed increased awareness of purchase alternatives.[75]

Although price information is an important factor in eyeglass purchasing decisions, it is by no means the only important factor. A study conducted by the California Optometric Association[76] found that consumers felt the reputation of the examining doctor and the services he or she provides are at least as important or even more important than the prices charged for an examination or for the eyeglasses themselves.[77] These findings rebut the contention that consumer decision-making will be solely motivated by price.

The economic losses being borne by consumers as the result of advertising bans do not represent the full extent of the consumer injury associated with these restraints. Advertising bans and the attendant higher prices have resulted in a significant decrease in consumption of vision care products and services among the less affluent.[78] The problem is perhaps greatest with respect to the elderly. Approximately 93% of those over age 65 use some form of corrective eyeware.[79] Since many elderly consumers have relatively low income levels but need corrective eyeware much more frequently than other groups, any decline in consumption attributable to high prices is especially serious for the elderly.[80]

6. *Economic impact on small businesses.* The rule's impact on small businesses is mixed. The requirement of release of prescriptions by ophthalmologists and optometrists will almost certainly aid small businesses, notably opticians who will be assured unfettered access to all potential eyeglass purchasers. "[T]he small business optician will thrive and eventually [the rule will] accomplish what the FTC seeks—lower prices to consumers while maintaining quality and service through competition."[81]

Advertising, however, might have a different impact on small businesses. The pressures generated by advertising could cause retail dispensers to either integrate vertically into manufacturing or expand horizontally at the retail level in order to take advantage of economies of scale. The result could be increased concentration in the industry as some inefficient businesses are driven out of the market.[82]

The overall impact of the Rule is therefore difficult to assess. The potential for increased concentration from the advertising aspect of the rule must be balanced against the probable gains small business opticians will receive from the release of prescription requirements. Additionally, the ability of firms to enhance their market position may be affected by other state laws which limit entry, access, or branch office locations.[83] Weighing all of these factors, the Commission is confident that "the rule will not result in driving the small businessman from the ophthalmic marketplace."[84] Even assuming that the rule were to cause a slight increase in concentration, consumers will not necessarily be injured. To the extent that the ophthalmic market has always exhibited oligopolistic tendencies—*e.g.*, absence of price competition, concerted withholding of relevant information, and high prices—it is due in part to the restraints the Commission is removing.[85] The rule will eliminate some of these present market characteristics; the overall effect will be a gain for consumers without causing any grave harm to small businesses.

7. *Major Industry Arguments in Support of Advertising Restraints.* Some opponents of ophthalmic advertising have argued that widespread deception will follow the lifting of advertising bans, either because price advertisements of highly variable products such as eyeglasses are inherently deceptive or because unscrupulous practitioners will be likely to use "bait-and-switch" or other deceptive advertising techniques.

The fact that there are different types of eyeglasses is not determinative of the issue of whether price advertising would be deceptive. Examination of the price lists for ophthalmic lenses indicates that the prices for lenses are less variable than the number of potential prescription formulas would lead one to believe. Wide ranges of prescriptive power lenses are grouped into a relatively small number of price categories.[86] Some wholesale

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[72] Testimony of Farrell Aron, American Optometric Association Statistician, Tr. 3877 at 3882.

[73] Outline of testimony of Paul A. Fine, California Citizens Action Group, HX 279.

[74] *Id.* For a more detailed discussion of the CCAG study, see Staff Report at 127-33 and 146-49.

[75] *Id.*

[76] Statement of Dr. Harvey Adelman, HX 245.

[77] Copy of computer results used by Dr. Adelman, HX 247; *see* Staff Report at 140-44.

[78] *See* Staff Report at 122-23.

[79] *See* materials cited in Staff Report at p. 122, n. 10.

[80] *See* Staff Report at 149-152.

[81] Testimony of Stephen L. Adams, President, Tennessee Dispensing Opticians Association, Tr. 6035 at 6038. *See also Dispensing of Eyeglasses by Physicians: Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. (1965), Exhibit II-26 at R. 770; Staff Report at 281-282.

[82] See, *e.g.*, Southern Research Institute, *The Advertising of Ophthalmic Goods and Services*, HX 356, at p. 21; testimony of J. Howard Sturman, Academy of California Optometrists, Tr. 3348 at 3364-65. See also Staff Report at 282-86.

[83] *See* Staff Report, Section II(B)(3). While these restrictions may have been imposed by some states for the purpose of limiting concentration, it is by no means clear that such a result will follow. Indeed, these restrictions may have adverse effects. Moreover, the Commission has publicly expressed concern that restrictions of this type may result in significant consumer injury. The Commission has authorized its staff to investigate the effects of restrictions of this type.

[84] *See* Report of the Presiding Officer at 126; Staff Report at 281. The staff and Presiding Officer agreed on this finding.

[85] *See* Staff Report at 286.

[86] *See, e.g.*, letter to FTC from Jerome Dienstag, Associate General Counsel,

Footnotes continued on next page

laboratories charge a single price for all single-vision lenses regardless of prescriptive power.[87]

Similarly, prices for the hundreds of different ophthalmic frames can be easily grouped into a small number of price categories.[88]

False or deceptive advertising, including "bait-and-switch" techniques, is already prohibited in every state.[89] To prohibit ophthalmic advertising totally because of the possibility that a few practitioners will engage in deceptive advertising constitutes a classic example of regulatory overkill. State and local consumer protection machinery is adequate to control ophthalmic advertising,[90] which is no more likely to be false or deceptive than advertising of any other goods or services.

It has been argued that if the Commission permits ophthalmic advertising, it should either require the affirmative disclosure of certain information, or alternatively permit the states to require such disclosures.[91] Where a state or local government has determined that all retail advertising should include certain disclosures, the rule will not prevent it from applying such requirements to ophthalmic advertising as well. Under Section 456.5 of the Rule, across-the-board regulations of this type (e.g., a requirement that all advertisements offering a special price disclose the price normally charged) would not be preempted.

The rule will also permit the states to require affirmative disclosures in any or all of the five limited areas unique to ophthalmic goods and services (see Section 456.5).[92] The Commission does not believe it is necessary to require such disclosures because most advertising does and probably will continue to include that information voluntarily,[93] but the Commission believes that it would not be unreasonable for the states to mandate these disclosures.

Some industry members have expressed the fear that advertising will lead to a loss of "professionalism."[94] The predicted effects of a lowered professional image are twofold: (1) consumers will lose confidence in practitioners and the doctor-patient relationship will deteriorate, and (2) fewer high-calibre people will wish to enter the profession in the future.

Perhaps the most compelling counter argument to the contention that advertising will impair the self-image of the professional and thus result in inferior eye care was made by optometrists who testified at the hearings. Virtually all these optometrists asserted that they would not lower their own standards of professional care if advertising were allowed.[95]

It is unlikely that consumers will perceive advertising as indicative of lowered professional standards. The CCAG study indicated that the current widespread withholding of information is viewed by many consumers as a calculated effort by professionals to obscure their economic motivations.[96] Advertising may serve to lower patients' suspicions and may actually enhance the professional's image.

The available evidence also fails to show that advertising will result in a reduction in the number of intelligent and committed persons who will choose to enter the profession.[97]

The major argument advanced by opponents of the rule was that the advertising of ophthalmic goods and services would lead to a deterioration in the quality of those commodities. The theory underlying this argument is that practitioners, by lowering their prices to survive in the more competitive market which advertising would engender, would be forced to provide inferior goods and reduce the quantity and quality of services offered.[98] A fundamental assumption on which this argument rests is that the prices of eye care goods and services are directly related to their quality.

The scant evidence presented in support of the notion that low cost is indicative of low quality in the current eye care market consisted primarily of anecdotal testimony alleging that certain discount optical establishments provide inferior goods and services.[99] The industry chose not to test empirically their assumption regarding the relationship between price and quality in those several regional ophthalmic markets where advertising and lower prices currently exist.

Other participants in this proceeding did attempt to measure the price-quality relationship.

Two separate studies were conducted on behalf of San Francisco Consumer Action (SFCA). The first study, conducted in California in 1975, compared prices with the quality of both eye examinations and eyeglasses.[100] This survey found that the quality of eye examinations—in terms of the accuracy of the prescriptions rendered and the numbers and kinds of tests conducted—was independent of the prices charged for those examinations ($12.50 to $35.00). The surveyors concluded that:

> Much of what goes on in an exam room depends, in the last analysis, on the conscientiousness and efficiency of the individual doctor. Little, if anything, is directly affected by the fees charged for such exams or whether the doctor advertises, is located in a professional building, or practices in a discount store.[101]

The SFCA study of lens quality produced similar results. The prices of the eyeglasses, which ranged from $20 to $37, were found to be unrelated to their quality, as measured by the lenses' adherence to the American National Standards Institute, (ANSI) Z-80 standards and conformance to the practitioners' prescriptions.[102]

The second SFCA study, conducted in Arizona, had a format similar to the California study and yielded similar results.[103] The surveyors obtained eye examinations which cost them from $14 to $35 and purchased eyeglasses priced from $24.15 to $43.90. Again, the findings showed that the quality of an eye examination or optical materials were not necessarily tied to price or manner of practice.[104]

The collective results of these studies and others[105] show that—contrary to the hypothetical assumptions of many of the rule's opponents—prices of eye care goods and services are not positively related to their quality. If low prices are not indicative of inferior

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Bausch and Lomb, Inc. (November 17, 1975), Exhibit V-20 at R. 7921.

[87] *See, e.g.*, Optical Brochure of the Heard Optical Co., Long Beach, Calif., HX 282.

[88] *See, e.g.*, advertisement by Opti-Cal, Exhibit II-32 at R. 849.

[89] Forty-nine states and the District of Columbia have enacted laws similar to the Federal Trade Commission Act to prevent deceptive and unfair trade practices. Alabama, which does not have such a law, has a statute which makes false advertising a misdemeanor, and a consumer complaint clearinghouse designed to facilitate enforcement of existing laws and recommend new legislation.

[90] *See* materials cited in Staff Report at 161, n. 30.

[91] *See, e.g.*, Comment of J. Harold Bailey, Executive Director, American Optometric Association, Exhibit VIII-160 at R. 14,726.

[92] *See* Staff Report, pp. 167-172, *and* memorandum of Albert H. Kramer, Director of Bureau of Consumer Protection, to FTC (December 9, 1977), Exhibit XIII-3.

[93] *See, e.g.*, advertisement by Opti-cal, Exhibit II-32 at R. 849; advertisement by 20/20 Contact Lens Service, Exhibit II-53 at R. 1449.

[94] The U.S. Supreme Court considered, and subsequently rejected, a similar argument in regard to pharmacists in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[95] *See* materials cited in Staff Report at 177, n. 98.

[96] Paul A. Fine Associates, *Study on Eye Care and Eye Services*, HX 280 at Tables 14 and 15.

[97] *See* Staff Report at 181-82.

[98] *See, e.g.*, materials cited in Staff Report at 183, n. 119.

[99] *Id.* at 184, n. 121.

[100] Delia Schletter, *Optical Illusion: A Consumer View of Eye Care*, San Francisco Consumer Action (1976), Exhibit II-65.

[101] *Id.* at R. 1658.

[102] *Id.* at R. 1663-67.

[103] Delia Schletter, *There's More Than Meets the Eye*, San Francisco Consumer Action (1976), HX 397.

[104] *Id.* at 203-04.

[105] *See, e.g.*, Adam K. Levin, *A Survey on the Quality of Eye Care and Eye Wear in New Jersey as it Relates to Price*, HX 167; New York City Department of Consumer Affairs, *Survey of Optometric Establishments, January 1976-June 1976*, HX 173.

goods and services in the current eye care market, it may be inferred that the level of quality would not necessarily change as advertising and the lower prices which would follow it become more widespread.

Another implied assumption of those who have argued that the removal of advertising restraints would cause a deterioration in quality is that those restraints currently contribute to the maintenance of high quality levels in the eye care goods and services markets.

But the only empirical study on the record which attempted to compare the quality level of an advertising state with that of a nonadvertising state found no quality differences between the two jurisdictions. The SFCA study referred to above found that the level of quality between the sample groups of examiners and dispensers in California and Arizona was much the same.[106] The clear inference from that finding is that California's prohibition on price advertising did not have the effect of fostering higher quality eye care than that available in neighboring Arizona.

The results of a New Jersey study also called into question the notion that that state's advertising ban had ensured that its citizens would receive high quality ophthalmic goods and services.[107]

The available evidence refutes the prediction that the quality of ophthalmic goods and services will deteriorate if advertising bans are removed. Given the professed goal of industry members to ensure that the public receives high quality eye care goods and services—and the evidence which shows that advertising bans do not insure the accomplishment of that goal—more direct approaches to quality control would seem appropriate.[108]

8. *Consumer Access to Ophthalmic Prescriptions.* Considerable testimony was given at the public hearing in this matter which indicates that prescriptions are not readily available to all consumers. Consumers are discouraged by several types of conduct from taking their prescriptions elsewhere to be filled.

Numerous persons—primarily consumers, representatives of consumer groups, and opticians—have testified that many optometrists and ophthalmologists simply would not release prescriptions to consumers, even when requested to do so.[109] A related concern is the practice of some doctors who will not conduct an examination unless the patient agrees in advance to purchase his eyeglasses from the practitioner.[110] At least one state board of optometry has held that optometrists are free to condition the availability of their services upon agreement by the consumer that all goods will be purchased from the examining optometrist.[111]

By far the most frequent practice employed to discourage consumers from shopping elsewhere is the charging of a fee for the prescription in addition to that charged for the examination if the consumer requests his prescription so that he can shop elsewhere for his eyewear.[112] Even though the additional charge may be only $5 or $10, it is still sufficient to discourage many consumers from obtaining prescriptions to shop around for the best buy.

A practice which is occurring with increasing frequency involves the conditioning of the release of a prescription on the signing of a waiver of liability.[113] In the most extreme case, the waiver form purports to relieve the examining refractionist of responsibility not only for defects which are attributable to the practitioner who dispenses the eyeglasses, but also for the examination itself.[114] The enforceability of such a waiver is not at issue here. Such disclaimers, enforceable or not, may have a significant impact on the consumer's decision whether to take his prescription elsewhere. Even less extreme disclaimers may have the effect of making consumers erroneously believe that other dispensers are not qualified to dispense their eyeglasses and discouraging consumers from shopping around for less expensive eyeglasses.[115]

Although many optometrists and ophthalmologists have stated their belief that patients are unconditionally entitled to obtain their prescriptions,[116] the evidence reflects the fact that consumers are encountering considerable difficulty in obtaining their prescriptions. In virtually every instance in which practicing optometrists were surveyed, for example, it was found that in excess of 50% imposed some restriction on the availability of the patient's prescription.[117] Such evidence supports the conclusion that consumers are being deterred from selecting the eyeglass dispenser of their choice because of their inability to obtain their prescriptions. The rule provision adopted in Section 456.7 is intended to ensure consumers unconditional access to their ophthalmic prescriptions.

In addition to the preceding discussions of the general importance of promulgating a prescription delivery requirement, it is necessary to explain the basis for the particular provisions included in the rule.

The most basic issue involves the requirement that the prescription must be tendered to the patient regardless of whether or not the patient has requested it.[118] The major difficulty with adopting a provision which would require release only upon request is consumers' lack of awareness that the purchase of eyeglasses need not be a unitary process.[119] Also, the right of the consumer to this prescription should be immunized from an evidentiary squabble over whether the consumer actually did or did not request the prescription. In addition, there is no evidence in the record to suggest that any significant burden would attend the release of the prescription in every instance.

It has been argued that examiners should be able to condition release of the prescription on the patient's fulfillment of all financial obligations to the provider. The Rule accommodates this concern but requires that examiners not discriminate in their payment or billing policies against those who wish to take their prescriptions elsewhere to comparison shop.

The rule also allows a refractionist to charge an additional fee for verifying the accuracy of lenses dispensed by another seller, but only when the verification is actually performed. No other "surcharge" may be imposed for releasing the prescription.

Some participants in this proceeding argued that the rule should require a disclosure on the prescription form itself, informing the consumer of his right to take his prescription to any dispensing ophthalmologist, optometrist, or optician.[120] It may be true that consumers are generally unaware of their eyeglass purchasing alternatives, but a mandatory disclosure here is unnecessary because advertising should substantially remedy this lack of knowledge.[121]

9. *Advertising of Eye Examinations.* From the very inception of this proceeding, the issue of whether the rule should be expanded to include the ad-

[106] *There's More Than Meets the Eye, supra* note 103 at 204.

[107] Adam K. Levin, *supra* note 105, at 11.

[108] *See* materials cited in Staff Report at 210, n. 206.

[109] *See, e.g.,* materials cited in Staff Report at 241-42, n. 27.

[110] *See, e.g.,* materials cited in Staff Report at 243, n. 32.

[111] Position Statement of Michigan State Board of Examiners in Optometry, HX 315 at 1-2.

[112] *See* Staff Report at 245-47.

[113] *Id.* at 248-51.

[114] *See, e.g.,* Testimony of Donald Juhl, President, Jack Eckerd Corporation, Tr. 379 at 395.

[115] *See, e.g.,* Testimony of E. Craig Fritz, President, Connecticut Opticians Association, Tr. 2827 at 2832.

[116] *See, e.g.,* Staff Report at 252, n. 54-56.

[117] *See* Staff Report at 252-53.

[118] *Id.* at 267-69.

[119] *See, e.g.,* testimony of J. Howard Sturman, Academy of California Optometrists, Tr. 3348 at 3366.

[120] *See, e.g.,* testimony of Earl Hendrix, Hendrix and McGuire Dispensing Opticians, Tr. 3995 at 4002.

[121] *See,* Staff Report at 278.

vertising of information related to the eye examination has been squarely before the public.[122]

In his report, the Presiding Officer strongly recommended adoption of a provision that ophthalmologists and optometrists be permitted to advertise their eye examination fees.[123]

The staff also believed that the evidence supported the lifting of bans which prohibit the price advertising of eye examinations.[124] However, the staff recommended that the Commission delay taking action on the examination price advertising issue until a later date when related service advertising issues, such as whether the advertising of professional credentials or practice specialties should be allowed, could be fully explored.[125]

The Commission has concluded that the failure to include in the rule a provision which eliminates existing restrictions on the advertising of eye examinations would seriously reduce the effectiveness of the rule.

Public and private restraints on the advertising of cost and availability of eye examinations are widespread. More than 40 states prohibit the advertising of price information about eye examinations.[126]

The effects of such restraints on consumers are similar to the effects of restraints on the advertising of ophthalmic goods and services. For example, there are wide variations in the prices of eye examinations just as there are wide variations in the prices of eyeglasses. Three surveys found price variations of 200-300 percent.[127]

It is difficult to find data comparing the average prices for eye examinations in states that restrict advertising to those in states that permit it because restrictions are so widespread. The actual occurrence of advertising of eye examinations has apparently been so limited that it has not permitted a study, similar to the Benham studies previously discussed, to be conducted. An informal survey conducted by the Virginia Citizens Consumer council compared prices in Virginia with those in the District of Columbia, finding significantly lower prices in the District of Columbia, which has no restrictions on advertising of eye examinations.[128] Economic theory would lead one to expect that introduction of information tends to decrease consumer search costs as well as lead to greater price competition among sellers.[129] Such theory was confirmed by Benham's studies concerning prices of eyeglasses; there is no reason to expect it would not also be confirmed by more complete studies of examination prices.

Consumer ignorance is as prevalent with respect to eye examinations as it is with respect to eyeglasses.[130] Advertising would help to reduce this ignorance.

And just as many of the elderly and poor are doing without needed eyeglasses because of high prices and lack of information and affordable alternatives, they are also doing without eye examinations. Evidence in the record indicates that more people could get eye examinations more often if prices were lower.[131]

Those who oppose permitting the advertising of eye examinations offered two main objections. First, the cost of an examination varies widely from patient to patient because the nature and scope of an examination depends on the needs of the individual patient; therefore, price advertising of examinations is inherently deceptive. Secondly, advertising would not inform the consumer of the "quality" or the comprehensiveness of an advertised examination, and competition from advertising would force practitioners to engage in minimal, "quickie" examinations.[132]

Most of the optometrists and ophthalmologists who testified indicated that they charge a fairly standardized examination fee.[133] Therefore, it should not be difficult for practitioners to provide accurate, non-deceptive price information.

The "quality" argument concerning the advertising of examination fees does not differ substantially from the issue posed by the advertising of ophthalmic goods. If an optometrist or other examiner chooses to perform substandard examination, an advertising ban serves as no real deterrent. There are more direct means to control the problem of poor quality eye examinations, such as state laws which mandate minimum examination requirements.

As discussed earlier, virtually all the optometrists who testified asserted that they would not lower their own professional standards of care if advertising were allowed.[134] Most optometrists feel that they could handle a significantly larger number of patients than they currently do.[135] Therefore, fears that the increase in the number of eye examinations sought by the public which advertising will generate will force practitioners to take on more patients than they can handle seem unwarranted.

The Commission has declined, at this time, to impose any mandatory affirmative disclosure requirements upon the truthful advertising of eye examination. However, the Commission has chosen not to prevent the states from requiring that any specified affirmative disclosures be included in the dissemination of advertising concerning eye examinations if the states find such disclosures to be necessary.

10. *Discussion and Disposition of Suggested Additions to the Rule.* A number of consumers and consumer groups have advocated the imposition of a number of affirmative disclosure requirements on sellers.[136] The three major provisions advocated by these persons would require practitioners to provide consumers with price information over the telephone, to post prices in their places of business, and to itemize their bills so as to clearly differentiate the examination process from the dispensing process.

Each of these disclosures would greatly facilitate comparison shopping by consumers. But the proposed rule was designed to permit the dissemination of the information, not to require it. If it is found that consumers remain unable to obtain the necessary information on which to base their purchase decisions even after this rule becomes effective, the Commission can then consider whether to impose mandatory disclosure requirements on sellers.

Others believe that the rule should also remove related business restraints on providers of eye care goods and services.[137] Such restraints include: limits on the number of branch offices an eye care practitioner may operate, prohibitions on the employment of op-

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[122] *See* 41 Fed. Reg. 2,399 (1976); 41 Fed. Reg. 14,194 (1976).

[123] *Report of the Presiding Officer*, Exhibit XIII-1, at 168-71.

[124] Staff Report at 291.

[125] *Id.*

[126] *Staff Report to the Federal Trade Commission and Proposed Trade Regulation Rule Concerning Advertising of Ophthalmic Goods and Services* (January 1976), Exhibit II-1, at Appendix C.

[127] Adam K. Levin, *A Survey on the Quality of Eye Care and Eye Wear in New Jersey as it Relates to Price*, HX 167 ($10-$21); Delia Schletter, San Francisco Consumer Action; *Optical Illusion: A Consumer View of Eye Care* (1976), Exhibit II-65, at R. 1526 ($12.50-$35), and *There's More Than Meets the Eye* (1976), HX 397 ($14-$35).

[128] R. 7778.

[129] *See* Staff Report at 88-93.

[130] *See* outline of testimony of Paul A. Fine, California Citizens Action Group, Hearing Exhibit 276; *see also* Paul A. Fine Associates, *Study on Eye Care and Eye Services*, Hearing Exhibit 280.

[131] *See, e.g.*, Statement of Dr. Grady St. Clair, Chairman, American Association of Retired Persons and National Retired Teachers Association, Hearing Exhibit 296.

[132] *See, e.g.*, Comment of J. Harold Bailey, Executive Director, American Optometric Association, Exhibit VIII-160, at R. 14741.

[133] *See* Staff Report at 289, n. 6-9.

[134] *See* Staff Report at 177, n. 98.

[135] Alden N. Haffner, O.D., Ph.D., Project Director, *A National Study of Assisting Manpower in Optometry*, Department of Labor Contract No. 81-34-70-11 (1971), Exhibit II-17, at R. 618.

[136] *See* Staff Report at 292, n. 17-19.

[137] Post-Record Comment of Bruce J. Terris, Attorney, Americans for Democratic Action *et. al.*, August 12, 1977, at 42-59.

tometrists, ophthalmologists and opticians by lay corporations, and bans on the use of trade names. Such restraints are widespread.[138]

The evidence in the record on these restraints strongly suggests that they may increase prices to consumers. However, the record lacks the necessary evidence to evaluate the justifications offered in support of these restrictions. These and other restrictions in the ophthalmic market are the subject of an ongoing staff investigation.

B. LEGAL BASIS FOR THE RULE

1. *Unfair Acts or Practices Under Section 5 of the Federal Trade Commission Act.* This is the first Commission trade regulation rule proceeding conducted completely under the rulemaking authority granted by section 203 of the Federal Trade Commission Improvement Act:

> The Commission may prescribe rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of * * * Section 5(a)(1)). Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.[139]

The term "unfair" cannot be narrowly defined. When the Federal Trade Commission was created, Congress made a deliberate policy choice to adopt a general standard, giving the Commission, subject to review by the courts, both the responsibility and the authority to develop more precise articulations of the meaning of "unfair" in the context of specific industries or situations. Nor did the Congress intend that the meaning of the term be static. Economic and social development creates new problems which require new answers, and time and thought bring new insights into the nature of trade regulation problems and the efficacy of possible remedies. The Commission is charged with the responsibility of combining the functions of a court of equity with those of an expert body to develop concepts of "unfair acts or practices" appropriate to the issues of the present time.

Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the Commission. Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involved great hardship * * * Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed.[140]

In 1964 the Commission reviewed its prior decisions on unfairness and concluded that:

> No enumeration of examples can define the outer limits of the Commission's authority to proscribe unfair acts or practices, but the examples should help to indicate the breadth and flexibility of the concept of unfair acts or practices and to suggest the factors that determine whether a particular act or practice should be forbidden on this ground. These factors are as follows: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). If all three factors are present, the challenged conduct will surely violate Section 5 even if there is not specific precedent for proscribing it. The wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others. Beyond this, it is difficult to generalize.
>
> In the last analysis, the Commission's responsibility in this area is to enforce a sense of basic fairness in business conduct. For while Section 5 "does not authorize regulation which has no purpose other than . . . censoring the morals of business men" (*FTC* v. *R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 313 (1934)), the Commission cannot shirk the difficult task of defining and preventing those breaches of the principles of fair dealing that cause substantial and unjustifiable public injury.[141]

These pre-1964 cases emphasized the ethical dimensions inherent in "unfair acts or practices." These were cases in which consumer injury was caused by some act or practice which either offended society's moral sense as expressed in analogous case law or statutes or in other contexts. The Supreme Court recognized in *FTC* v. *Sperry & Hutchinson Co.*,[142] however, this is a minimum rather than a maximum statement of the nature of "unfair acts or practices." The Commission's authority is not limited only to practices which are subject to general public condemnation, it has a more general mandate to consider, in the Court's phrase, "public values."[143] In a complex economy, consumer injury can be caused by intricate chains of interaction among many participants, and the Commission is not prevented from acting simply because it is difficult to pinpoint the blame. Section 5, like other statutes administered by the Commission, is "unfinished law which the administrative body must complete before it is ready for application."[144] The intent of the Congress was to protect consumers from unwarranted injury in the marketplace. Thus, in carrying out its mandate to "finish" the law, since 1964 the Commission has increasingly concentrated on the examination of whether particular acts or practices are in fact causing injury, and on how and why they do so.[145] In addition, the Commission examines other public policies as articulated by other responsible bodies in the society that have weighed the acts or practices, to see if they have found some justification or compensatory benefit, and to determine whether the Commission's action does promote public policy as expressed in other contexts.[146]

These two inquiries are appropriate for this matter:

(1) Whether the acts or practices result in substantial harm to consumers. In making this determination both the economic and social benefits and losses flowing from the challenged conduct must be assessed, and

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[138] *See* Staff Report at 63-68.

[139] Federal Trade Commission Act Section 18(a)(1)(B), 15 U.S.C. 57a (1976). Section 5(a)(1) provides: Unfair methods of competition in or affecting commerce and unfair acts or practices in or affecting commerce are hereby declared unlawful. Federal Trade Commission Act Section 5(a)(1), 15 U.S.C. 45 (1976).

[140] FTC v. Gratz, 253 U.S. 421, 436-37 (1920) (dissenting opinion of Mr. Justice Brandeis), *dissent adopted*, FTC v. Brown Shoe Co., 384 U.S. 316, 320-21 (1966); *cited with approval in* FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972). *See also* H.R. Rept. No. 1142, 63rd Cong., 2d Sess. 18-19 (1914); S. Rept. No. 597, 63rd Cong., 2d Sess. 13 (1914).

[141] Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to Health Hazards of Smoking, 29 Fed. Reg. 8324, 54-55 (1964).

[142] 405 U.S. 233 (1972).

[143] *Id.* at 244.

[144] *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 485 (1952) (dissenting opinion of Mr. Justice Jackson) (footnote omitted).

[145] *See* Schwartz, *Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard of Fairness*, 11 Akron L. Rev. 1 (1977).

[146] This inquiry is not always an easy one. There are many possible sources from which a sense of prevailing public policy can be gleaned, and they are not always consistent with each other. The Commission must often balance conflicting policies and come to its own conclusions. And, of course, a practice may offend Section 5 even if it is specifically approved by state law. *See FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239 n. 4 (1972); *Spiegel, Inc.* v. *FTC*, 540 F. 2d 287 (7th Cir. 1976).

(2) Whether the challenged conduct offends public policy.

The second question—whether the failure to disseminate information occasioned by the body of state law at issue in this proceeding is offensive to public policy—is easily answered. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*[147] and *Bates v. State Bar of Arizona*[148] the Supreme Court has held that the consumer's right to receive price information is protected by the first amendment. We regard this as an authoritative declaration of general public policy in this area.[149]

Even if the consumer's right to receive information were not so clearly protected by the Constitution, we think its importance is sufficiently established by other sources, including a number of Federal statutes.[150]

We turn then to the first issue—whether consumers are injured by the lack of information. As is discussed at length in Part A of this Statement, economic theory indicates that if price information is not available, or if it can be obtained only at high cost, consumers are deprived of the opportunity to satisfy their needs at the lowest available price.[151] This is particularly true for consumers such as the old or the poor who find extensive search not just expensive but physically impossible. In addition, the lack of price information means that in many places prices will be higher than they would be if consumers could readily compare potential sources of supply.

The theoretical support for the conclusion that the failure to provide price information injures consumers is so strong that the Commission believes it could promulgate a trade regulation rule on this issue without additional direct empirical support.[152] Nonetheless, in the course of this proceeding extensive research and survey analysis was undertaken by the Commission staff and by other interested parties. This research, which is also discussed in Part A, provides strong verification of the theoretical expectation. Higher prices, lower rates of consumption by the poor and the elderly, and lower frequency of eye examinations are the result of the failure of sellers and refractionists to disseminate information in the ophthalmic market. Moreover, the record established that the failure to provide necessary information concerning eye examinations and ophthalmic goods and services is the direct result of state laws and private codes which compel such an outcome.

The question arises as to whether the apparent consumer injury resulting from these restrictions represents the whole picture. Supporters of the advertising restrictions have claimed that the restrictions provide consumers with health and safety benefits that offset the economic injury. The issue of health and safety benefits has also been the subject of extensive empirical inquiry in the course of the proceeding, and is also analyzed in Part A.[153] There is no persuasive evidence in the record that the restrictions do in fact produce the claimed significant health and safety benefits, or that they are an efficient way to promote such benefits, or that the public health and safety would be jeopardized by their absence. Nor are they necessary to prevent deception.[154] This is not a matter in which the Commission must weigh complicated evidence concerning the relative merit of competing desirable objectives, or decide how much economic injury should be sustained for the sake of how much health and safety benefit. There is little support for the argument that the restrictions on price advertising are producing any benefits to offset the injury caused.

This consumer injury, coupled with the specific public policy in favor of providing information to consumers, is sufficient to support the rule. However, there is a more general policy on which we can also rely. That is, the public policy of this country favors the existence of free markets to the maximum extent possible. While the complexity of the modern economy often necessitates a departure from free market organization, as a general proposition a market-perfecting solution to a perceived problem is preferable. There should be a heavy burden of proof on those who would opt for a different form of economic organization; that burden has not been met here.[155]

For sixty years this assumption has been the foundation of the Commission's analysis of its responsibilities with respect to unfair methods of competition. A free market cannot function properly in the absence of effective competition and a primary duty of the government is to prevent collusion, undue concentration, or other practices that undermine this functioning.

What is sometimes overlooked, though, is that the existence of competition is only one requisite for a functioning free market. There are a number of other factors involved, such as availability of information, a lack of excessive transaction costs, a lack of costs incurred by or benefits accruing to persons external to the decision process and mobility of resources.[156] Thus, the Commission's responsibility to promote the efficient functioning of markets has relevance to its interpretation of its mandate to act against "unfair or deceptive acts or practices" as well as against "unfair methods of competition." Acts or practices which cause consumer injury by creating, exploiting, or failing to alleviate market imperfections other than a lack of or threat to competition can be unfair within the meaning of Section 5.

Such an economic rationale underlies the Commission's action on Preservation of Consumers' Claims and Defenses.[157] That rule concerns sellers' separation of the consumer's duty to pay from the seller's duty to perform, and the transfer of the risks of sellers non-performance to the consumer. The Commission determined that only if the risks and costs of non-performance remained with the seller would an efficient level of risk be achieved.[158]

This example is given only to establish that our views here are not without precedent. It is sufficient to say that an additional test of unfairness in the instant matter is whether the acts or practices at issue inhibit the functioning of the competitive market and whether consumers are harmed thereby. (Whether the inhibition is justified is of course part of the test of consumer injury.)

Since one of the absolute essentials of a competitive market is information, particularly information about prices, and since the net consumer injury has been clearly established, this test is also met.[159]

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[147] 425 U.S. 748 (1976).

[148] 433 U.S. 350 (1977).

[149] It does not necessarily follow that the right to receive information under Section 5 is co-extensive with the first amendment right. *Virginia Pharmacy* and *Bates* provide general, not specific, policy guidance.

[150] *See, e.g.*, Truth in Lending Act, 15 U.S.C.A. §§ 1601 *et seq.* (1977 Supp.); Fair Packaging and Labeling Act, 15 U.S.C. §§ 145 *et seq.* (1976); Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601 *et seq.* (1976). There are other significant policy considerations which justify the Commission's action in this matter. See discussion at notes 155-159 and accompanying text.

[151] *See* Section A(4), *supra.*

[152] Theoretical studies, economic models and similar works are a vital part of a rulemaking record. Under appropriate circumstances they can themselves constitute substantial evidence within the meaning of that term. *See American Public Gas Ass'n* v. *FPC*, 567 F.2d 1016, 1036-43, 1080 (D.C. Cir. 1977).

[153] *See* Section A(7), *supra.*

[154] Id.

[155] *See, e.g.*, Charles Schultze, The Public Use of Private Interest *passim* (Brookings 1977).

[156] *See, e.g.*, Paul Samuelson, Economics 36-76, 371-616 (6th ed, 1964).

[157] 40 FR 53,506 (1975).

[158] *Id.* at 53,522-24.

[159] The Commission's analysis of the standard of "unfair practices" requires a balancing of the various components of that test. For example, the fact that a practice injures consumers by impeding the operation of a competitive market could be considered as either a "policy" consideration or an element of the equation to determine "consumer injury" (or both). The Commission believes that it is incumbent upon it to clearly

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2. *Specific Provisions.* The overall unfair result in this matter has been created by an interrelated web of private and public actions. The rule defines each of them with specificity.

The first section of the rule, §456.2, makes it an unfair act or practice for sellers *en masse* to fail to disseminate information. It then states that the failure of an individual acting alone shall not be regarded as unfair within the meaning of Section 5. This formulation is based upon the principles set forth above. The basic problem is that the people who usually disseminate information through advertising, the sellers, do not do so in this market. At the same time, in few industries does everyone advertise. Individuals' views and incentive structures differ and what is sensible for one may not be for another. Normally, the market provides sufficient incentives for enough people to advertise so that the information is supplied. In this context an individual failure to advertise is not an unfair act or practice because it produces no harm. Even in the context of a total failure to disseminate information by all sellers it is difficult to find an unfair act or practice in the failure of any individual seller to advertise. He might or might not have advertised anyway, and his share of the total harm caused is infinitesimal. Thus, the Commission has chosen to make explicit that an individual cannot be held liable under the rule for not advertising.

This, of course, creates a rule which the Commission cannot directly enforce because there is no one against whom it could bring an action. The normal regulatory solution would be to require affirmative disclosure of information, an action clearly within the Commission's power. In this case, however, there is a superior, less-intrusive remedy: the creation of an explicit right to advertise which provides a defense to any private or non-federal effort to inhibit an individual from advertising. The record in this proceeding demonstrates that where permitted to do so, sellers of ophthalmic goods and services and refractionists willingly provide the necessary material information to the public.

Section 456.3 prohibits non-federal governmental restraints on the dissemination of information by sellers and refractionists. However, by specifically eliminating the possibility of liability for civil penalties under section 5(m)(1)(A) and redress under Section 19(b) of the Act, the Commission has eliminated the spectre of the Commission holding a state official financially liable for enforcing the acts of his or her state's legislature. The Commission retains the authority to seek cease and desist relief under Section 5(b) of the FTC Act and injunctive relief under section 13 of the FTC Act and other applicable statutes to prevent state or local officials from interfering with the mandates of this rule.

Section 456.4 defines as unfair an individual seller's failure to advertise if the sole reason for the failure is his or her desire to comply with non-federal laws or private codes of conduct. As the Declaration of Intent (Section 456.9) makes clear, the seller's motivation is the sole criterion of the applicability of this provision. Again, the purpose is to provide a defense for the advertiser. It is not necessary to compel dissemination of information when simply permitting it is an adequate remedy.

Some industry members have contended that this section defines "compliance with state law," not the failure to provide information, as the unfair act or practice.[160] The Commission is not asserting that in the abstract compliance with state law is unfair. However, the Commission is finding that a seller or refractionist who would otherwise provide material information to the public, and fails to do so solely to comply with the mandates of state law, is acting unfairly. As discussed earlier, the unfair act or practice here is defined as the failure to provide information and the resultant consumer injury.

With respect to Section 456.2, 456.3 and 456.4, the Commission finds that the underlying conduct is substantively unfair within the meaning of Section 5(a)(1) of the FTC Act. Moreover, each of the aforementioned sections provides an appropriate remedy to rectify the failure of the ophthalmic market to generate the necessary information.

Section 456.5 of the Rule specifically permits states and local governmental entities to impose limited affirmative disclosure requirements upon advertising of ophthalmic goods and services. Various persons have argued either that the Commission should require the affirmative disclosure of certain information in such advertising, and that it should permit the states to require such disclosures.[161] Several states, including New York, Massachusetts and Virginia presently require certain disclosures.[162]

In weighing the desirability of affirmative disclosure requirements the Commission necessarily engaged in a balancing process. The Commission supports the goal of providing maximum useful information in advertisements. However, disclosure requirements can increase advertising costs and discourage advertising altogether.[163] Numerous parties to this proceeding contended that if permitted, states would circumvent the Commission's rule by indirectly prohibiting advertising through the imposition of burdensome disclosure requirements which were unnecessary to deter deceptive or unfair advertising.[164] Based on the available data, it appears that the imposition of unnecessary and potentially burdensome disclosure requirements is a strong possibility.[165]

To prevent the barring of advertising of ophthalmic goods and services by such indirect means, the Commission has limited the instances in which the states may require disclosures in such advertising. Section 465.5 of the rule delineates these exceptions. In addition, this section specifically recognizes the right of the state or local governmental entities to petition the Commission for additional disclosure requirements.

In fashioning its remedy, and to prevent future occurrences of the defined unfair acts, the Commission has employed a standard which permits the states to impose disclosure requirements which possess the potential for minimizing deception or unfairness. In the area of eye examination advertising the Commission declined, at this time, to circumscribe the ability of states or private parties to impose reasonable affirmative disclosure requirements.

Section 456.6 prohibits private restraints on the dissemination of information. In the light of the preceding analysis, the imposition of private bans on advertising as an unfair act or practice requires no special discussion. However, one aspect of this provision should be explained. Section 456.6(b) specifically permits organizations which are not primarily composed of ophthalmic industry members to impose across-the-board advertising standards which also apply to advertisements of ophthalmic goods and services. It is the Commission's intent that groups such as the National Association of Broadcasters be able to adopt guidelines which set standards for all advertising. Groups such as the Better Business Bureau which might incidentally include a seller or refractionist, but which are not composed *primarily* of such persons, may also adopt or enforce across-the-board advertising standards under this rule. However, groups such as the NAB or BBB are not permitted by the rule to establish specific guidelines for ophthalmic goods and services advertising.

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set forth the factors it evaluated in reaching its decision in this matter. In future matters other paths of analysis can and will be employed where appropriate.

[160] Comment of the American Optometric Association, Exhibit XIV-30 at 42.

[161] *See* Staff Report at V(A)(3) and IX(B).

[162] *Id.* at VI(B).

[163] *Id.* at VI(B), n. 63.

[164] *Id.* at n. 65.

[165] *Id.* at VI(B).

Groups which are primarily composed of sellers and refractionists cannot impose any disclosure requirements on the advertising of ophthalmic goods and services whatsoever.

Section 456.7 requires a refractionist to furnish a copy of the prescription to the buyer at the conclusion of the examination. The evidence in the record establishes that consumers are subject to substantial economic loss through the imposition of surcharges for obtaining the release of their ophthalmic prescriptions, and through the "lost opportunity" costs attributable to the lack of comparison shopping caused by the outright refusal to release prescriptions.[166] In addition, through the use of waiver notices and other forms of disclaimers, consumers are being deceived as to the capabilities of other practitioners and as a consequence are induced to restrict their purchase options.[167] In many instances, these tactics enable refractionists to retain patients who might otherwise have gone elsewhere for dispensing, or, in the case of surcharges, permit the refractionist to recoup lost revenue for services not performed.[168] Based on this evidence, it is the Commission's finding that the failure to release ophthalmic prescriptions and related practices are unfair acts or practices. The consumer injury associated with these practices is clear from the preceding discussion. The policy inquiry is essentially the same as that elaborated upon in our discussion of the advertising restrictions. The practices addressed in Section 456.7 offend public policy in that they deny consumers the ability to effectively use available information and inhibit the functioning of the competitive market model.

Moreover, this provision is necessary to make the price disclosure provision fully effective. Without the right to their prescriptions, the Commission's efforts to insure maximum useful information in the market will have little effect on consumers where these practices prevail. Thus, it is the Commission's finding that Section 456.7 is justified both as a specific delineation of an unfair act or practice as well as a remedy to implement the right to advertise.

3. *Unfair Acts or Practices v. Unfair Methods of Competition.* One comment filed in this proceeding challenged the Commission's authority to promulgate this trade regulation rule on the grounds that the practices covered by the rule are practices which affect the structure and workings of the market. This, it is argued, removes the practices from the coverage of the Section 18 of the FTC Act, which covers rules governing unfair or deceptive acts or practices, but does not specifically address the Commission's authority to promulgate rules governing unfair methods of competition.[169]

Leaving aside the fact the the Commission can prescribe rules governing unfair methods of competition,[170] this argument misconceives the meaning of "unfair or deceptive acts or practices."

The original FTC Act covered only "unfair methods of competition." In 1938 Congress adopted the Wheeler-Lea Amendments to the Federal Trade Commission Act[171] adding the provision which forbids "unfair acts or practices" as distinguished from unfair methods of competition. The impetus for the addition of the Wheeler-Lea Amendments came from the decision of the Supreme Court in *FTC* v. *Raladam Co.*,[172] in which the Supreme Court held that the Commission's power under "unfair methods of competition" was limited to those cases in which the Commission could prove an impact on present or potential competitors—injury to the general public was not enough.

The legislative history of the Wheeler-Lea Act establishes that the distinction between "unfair acts or practices" and "unfair methods of competition" rests on the victims of the injury, not upon any fundamental aspect of the action itself. If the action injures competitors or the competitive system, it is an unfair method of competition. If the same action causes injury to consumers it is an unfair or deceptive act or practice.[173]

Many unfair or deceptive trade practices with which the Commission is concerned would meet either test. False advertising, for example, is an unfair and deceptive practice because it misleads consumers and causes direct injury. It could also be categorized as an unfair method of competition because it diverts trade from honest to dishonest businesses. The Magnuson-Moss Act was intended to expand consumer protection remedies, not contract them, and as long as the requisite consumer injury is present, the Commission's authority to promulgate rules is clear. If such rules have the ancillary effect of improving the competitive system, this is a bonus, not a disablement.

4. *Preemption of State Laws by the Commission.* In section B(1), we noted that it is well settled that the Commission may proscribe conduct permitted by state law.[174] In this proceeding, ly permitting conduct, i.e., advertising, which has been specifically proscribed by the states. One of the frequently voiced arguments in this proceeding has been the contention that the Commission lacks the authority to preempt the "reasoned health regulation" of the states.[175] In this regard it has been contended that the doctrine set forth in *Parker* v. *Brown*[176] serves as a bar to Commission preemption.

The Commission does not believe that the *Parker* exception to the Sherman Act is determinative of the question of Commission preemption authority under the Federal Trade Commission Act. In *Parker* the Supreme Court hinged its state action exemption on its reading of the legislative history of the Sherman Act:

> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state . . . . conclusions derived not from the literal meaning of the words "person" and "corporation" but from the purpose, the subject matter, the context and the legislative history of the statute.[177]

The proper test for measuring the ability of the Commission to preempt state law has, we believe, been correctly stated by the American Optometric Association as being not whether Congress could have preempted state advertising bans, but rather whether such authority was delegated by Congress to the Commission under the Federal Trade Commission Act, as amended.[178]

Generally, two propositions emerge from an analysis of the legislative history of the Congressional grant of rulemaking authority to the Commission under the Magnuson-Moss amendments: (1) the general grant of rulemaking power was not itself intended to foreclose states from all regulation of the consumer protection field;[179] and (2) it *was* intended that the Commission would have power to preempt state laws by promulgating rules.[180]

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[166] *See* Section A(7), *supra.*

[167] *Id.*

[168] Seymour L. Coblens, Optometry and the Law 66 (1976).

[169] 15 U.S.C. § 57(2).

[170] *See National Petroleum Refiners Ass'n* v. *FTC*, 482 F.2d 672, 686-89 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

[171] 52 Stat. 111 (1938).

[172] 283 U.S. 643 (1931).

[173] H. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937).

[174] *See, e.g., Spiegel, Inc.* v. *FTC*, 540 F.2d 287 (7th Cir. 1976), aff'g 86 FTC 425 (1975).

[175] Comment of the International Association of Boards of Examiners in Optometry, Inc., Exhibit XIV-25 at 3; Comments of the Kansas Optometric Association, Exhibit XIV-40, at 2.

[176] *Parker* v. *Brown*, 317 U.S. 341 (1943).

[177] *Id.* at 351.

[178] Comment of the American Optometric Association, Exhibit XIV-30 at 40.

[179] *See* S. Rep. No. 91-1124, 91st Cong., 2d Sess. 9 (1970).

[180] For example, the Senate Commerce Committee's report on an earlier version of the final Magnuson-Moss legislation stated the following concerning the preemptive effect of Commission trade regulation rules: "In the course of the Committee's consideration of the Commission's rulemaking power the issue of preemption was discussed. At the present time a Trade Regulation Rule would preempt state legislation or regulation that conflicted." S. Rep. No. 92-269, 92d Cong., 1st Sess. 28 (1971). Relevant

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Thus, it is the Commission's position that Commission trade regulation rules are preemptive in nature.

5. *A State as a "Person".* Under § 456.3 of the Rule, the Commission has specifically defined the enforcement of state advertising bans to be an unfair practice. This necessarily raises the question of whether the state or its officials are "persons" for jurisdictional purposes under the Federal Trade Commission Act.

The issue of whether a state was a "person" under various federal statutes has come before the Supreme Court in a line of cases dating back to *Ohio* v. *Helvering*, 292 U.S. 360 (1934). That case involved a claim by a state that its state-owned liquor stores fell outside the scope of a federal tax on "every person who sells" liquor. Consequently, the Court had to determine whether states fell within the statutory definition of person. In its decision the Court refused to lay down an absolute rule, saying, "whether the word 'person' or 'corporation' includes a state . . . depends on the connection in which the word is found." *Id.* at 370.

The general approach of *Helvering* has been followed by later cases, in that the issue of whether states were "persons" was resolved separately for each statute by referring to "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute . . . ." *United States* v. *Cooper Corp.*, 312 U.S. 600, 605 (1941).

In the Supreme Court's recent decision in *City of Lafayette, Louisiana* v. *Louisiana Power & Light Co.*, 46 U.S.L.W. 4265 (1978) the Court determined that state and local governmental entities are "persons" within the meaning of that term in the Sherman Act. Citing its earlier decisions in *Chattanooga Foundery & Pipe* v. *City of Atlanta*, 203 U.S. 390 (1906) and *Georgia* v. *Evans*, 316 U.S. 159 (1942) the Court held that there is nothing in the Sherman Act, "its history, or its policy" which would exclude states or cities from the definition of "persons."[181]

The Court has also looked to whether exclusion of states from the statutory class of "persons" would frustrate the purpose of the statute.[182] Permitting the states to commit unfair acts or practices, i.e. prohibiting the providing of material information to consumers by private parties, would frustrate the purpose of the Federal Trade Commission Act. The Commission recognizes that in the exercise of its jurisdiction over states, caution must be exercised. The Commission has sought to minimize the effects of the Rule on the states by eliminating Section 205 and 206 liability for civil penalties and redress. (See Section 456.3 of the Rule.)

Moreover, the Commission is cognizant of the fact that in at least one instance the Supreme Court has recognized a "state sovereignty" defense to the exercise of federal authority under the commerce clause. See *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). In the *NLC* case, the Court prohibited the imposition of federal minimum wage standards on state employees, citing the potential interference with the internal functioning of the state. 426 U.S. at 840-41. While the scope of this decision is unclear the Commission in Section 456.8 has decided to exclude from the Rule's coverage state employees who are refractionists or sellers. The Commission has also decided to exclude from the rule's coverage federal employees such as military personnel and other Department of Defense employees. This exemption, contained in § 456.8, eliminates the potential for conflict between the regulations of different federal entities.

In the course of the Commission's analysis of the law of unfairness under Section 5 of the Federal Trade Commission Act, the Commission examined in great detail the intent, purposes, and goals underlying the state and local laws preempted by this rule. While the Commission has the legal authority to preempt the state laws at issue here, it has also considered whether as a matter of sound regulatory policy it should defer to the state judgments despite the overwhelming evidence that the restrictions on advertising cause consumer injury without producing offsetting benefits. Overruling the judgment of the states in a matter such as this is a serious step. No matter what the legal authority, it should be a step taken reluctantly. However, the Commission's primary obligation is directly to the people of the country to protect them against unfair acts or practices. We would be abandoning that obligation if we failed to take action against acts and practices which so clearly injure consumers. If theoretical analysis or empirical research created substantial doubt about the impact of these practices, we might choose to defer as a matter of comity. But we do not think such is the case in this matter.

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to the Commission's consideration of whether it has the authority to promulgate rules with preemptive effect is an excerpt from the legislative history of the Magnuson-Moss Federal Trade Commission Improvement Act set out in Appendix A to this Statement of Basis and Purpose.

[181] In its opinion the Court stated: "[T]he conclusion that the antitrust laws are not to be construed as meant by the Congress to subject cities to liability under the antitrust laws must rest on the impact of some overriding public policy which negates the construction of coverage, and not upon a reading of 'person' or 'persons' as not including them." [citation omitted] 46 U.S.L.W. at 4267.

[182] *See, e.g., United States* v. *California*, 297 U.S. 175 (1936); *Union Pacific R.R. Co.* v. *United States*, 313 U.S. 450 (1941); *Plumbers' Local 298* v. *County of Door*, 359 U.S. 354 (1959).

Appendix

The first Congressional activity on legislation which culminated in passage of the Magnuson-Moss Act came in a 1970 report of the Senate Commerce Committee.[1] The Committee had held hearings on a bill to expand the FTC's jurisdiction and enforcement powers[2] and the FTC had taken the opportunity to recommend inclusion of a grant of substantive rulemaking authority.[3] The Committee agreed, and recommended such a grant along with its recommendation for expanding FTC jurisdiction to practices "in or affecting" interstate commerce.[4]

At this point, preemption had not been discussed in connection with the grant of rulemaking authority. Instead the Committee's main concern was that the expansion of FTC jurisdiction itself not be construed as ousting states from the field of consumer protection.[5] The Committee report cautioned that the expansion of jurisdiction was "not intended to replace local enforcement of state or local laws against unfair trade practices,"[6] and recommended the addition to the bill of a section entitled "State Laws Not Affected":

"Sec. 106. The Amendments made by this title shall not affect the jurisdiction of any court or agency of any state or the application of the law of any state with respect to any matter over which the Federal Trade Commission has jurisdiction by reason of such amendment insofar as such jurisdic-

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[1] S. Rep. No. 91-1124, 91st Cong., 2d Sess. (1970).

[2] S. 3201, 91st Cong., 1st Sess. (Dec. 3, 1969).

[3] *Hearing on S. 3201 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st and 2d Sess. 65 (1970).

[4] S. Rep. No. 91-1124, 91st Cong., 2d Sess. (1970).

[5] In some areas, the courts have read the mere delegation of authority to an agency as a congressional "occupation of the field" which showed an intent to exclude all state regulation of that subject. *E.g., Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U.S. 605 (1926). This is not an inevitable result, for (as in all preemption cases) the issue is one of Congressional intent, and in other areas the courts have found that preemption had been intended only when state laws in some way conflicted with the way the federal agency used its power. *E.g., Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236-37 (1947); *see generally Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 773-74 (1947). At the time the rulemaking legislation was being considered, the lower courts had already held that the FTC act itself had not been intended to exclude the states from the field of consumer protection; *e.g., Double-Eagle Lubricants, Inc.* v. *Texas*, 248 F. Supp. 515 (N.D. Tex. 1965), *appeal dismissed*, 384 U.S. 434 (1966). Congress apparently wanted to make sure that the expansion of the Commission's jurisdiction would not lead to a different construction.

[6] S. Rep. No. 91-1124, 91st Cong., 2d Sess. 9 (1970).

tion or the application of such law does not conflict with the provision of the Federal Trade Commission Act, *regulations thereunder*, or the exercise of any authority by the Commission under such Act. [Emphasis added.][7]"

This was added, in the Committee's words, to make clear that the bill's provisions "do not preempt or affect state laws not in conflict with * * * regulations [under the FTC Act] or the exercise of any authority by the Commission under such Act."[8]

While the purpose of this section was to show that states were not completely excluded from the field, it clearly implies that state laws *would* be preempted to the extent that they were "in conflict with" FTC rules or other Commission activity. This understanding is confirmed by the subsequent Judiciary Committee hearings on the bill.[9] Senator Ervin believed that such preemption was a natural incident to FTC substantive rules which conflicted with state law, and wanted to either delete the preemption section (Section 106) as superfluous or (his strong preference) change it to prevent any FTC Rule from overturning state laws.[10] Other witnesses shared this belief about the preemptive effect of the FTC rules, although not all of them opposed such a result, and Section 106 was viewed as merely confirming a power which would have been implicit anyway.[11] The significant point is that all parties agreed that the FTC would have preemptive powers under Section 106. The only differences concerned the question of whether or not this was a power that the FTC already possessed. And though no further action was taken on the bill during the 91st Congress,[12] the Committee deliberations set the framework for subsequent congressional consideration of these issues.

In the 92nd Congress, the Senate again considered a bill to expand the FTC's jurisdiction and confirm its substantive rulemaking authority.[13] The rulemaking provisions were identical to those considered a year earlier, except that Section 106 had been dropped from the bill.[14] However, the preemption issue still received extensive discussion, both in the Commerce Committee and on the Senate floor, and it appears that the omission of that section had not changed the congressional intent. It was still intended that the expansion of FTC authority not be read as automatically excluding the states from that field, although this issue was not as extensively discussed as it had been the previous year.[15] More importantly, it was also intended that specific FTC rules would be able to preempt state law.

Consideration of the latter preemption issue began during the Commerce subcommittee hearings on the bill. The subcommittee Chairman had requested the FTC to analyze the preemptive effect of its regulations, and the FTC memorandum submitted in response concluded that under existing law FTC rules would preempt conflicting state regulations.[16] The other witnesses that addressed the issue made the same assumption about the preemptive effect FTC rules would have, and used this to argue against the grant of rulemaking power.[17] However, the Commerce Committee was nearly unanimous[18] in recommending adoption of the rulemaking provision, and submitted the following views on its preemptive effect:

"In the course of the Committee's consideration of the Commission's rulemaking power the issue of a preemption was discussed. At the present time a Trade Regulation Rule would preempt state legislation or regulation that conflicted. But the 'conflict' test is a very difficult one to apply.

"It is the view of this Committee that the Federal Trade Commission would be empowered to prescribe with specificity, when promulgating legislative rules, the extent to which comparable State law is preempted and how it is preempted. For example, if the Commission were to prescribe a uniform national rule governing the practices of door-to-door salesmen it would prescribe the effect of that rule on the various state statutes. It might standardize the forms to be used and the procedures to be followed while specifically leaving state law intact as to enforcement procedures and penalty provisions.[19]"

The debates on the Senate floor make it clear that, even though no specific preemption section had been written into the bill, it was still intended that the FTC would be able to preempt inconsistent state laws with its rules. Senator Moss, the Chairman of the subcommittee that had considered the bill, explained that:

"S. 986 has no 'preemption' provision. As the preemption provision of S. 3201 [the bill considered the previous year] is simply a restatement of the Federal Supremacy Doctrine as set forth by the Supreme Court, the inclusion or omission of this section would have no legal consequence.[20]"

A subsequent exchange between Senator Hruska (who opposed the rulemaking provision) and Senator Magnuson (sponsor of the bill and Chairman of the Commerce Committee) shows the extent of the preemptive authority intended:

"Senator HRUSKA. I come from an agricultural part of the country, the big breadbasket and the meat locker of the Nation. We have a farm program that has been going on for many years now. Part of that farm program is based upon the idea that there should be a limitation of production so that there will not be such surpluses of agricultural products that the market will become so depressed that the agricultural industry, the raisers of wheat, feed, grains, hogs, and cattle, will not get into an economic structure which would make it impossible for those engaged in that industry to continue their activities. The program involves setting aside a certain number of acres which will not be tilled and which will not produce agricultural goods.

"Yet that program could well become grist in the mill for the Federal Trade Commission if it were armed with the authority which section 206 [rulemaking] seeks to give it. Certainly it could be said it is unfair and it is bad for the consumers to be deprived of those products which could be grown on those unused acres 'and we therefore make a rule that there shall be no laws that will forbid the use of acres.'

"So you see, Mr. President, it is not only in new fields that this power would enable the Federal Trade Commission to function; it could take existing laws and existing statutes and say, 'These laws and statutes are unfair.'"

Senator MAGNUSON. I listened to the statement by the Senator from Nebraska [Hruska] and I have no objection to the way he analyzes the rulemaking section. Legally, I think what he said is correct.[21]

The Senate passed the bill by a 76-2 vote, but the House took no action on it before Congress adjourned.[22] However, new bills

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[7] *Id.* at 23.

[8] *Id.* at 11.

[9] Although the bill was sent to the Judiciary Committee for study of a provision allowing class actions, much of the hearings focused on the preemptive effect of the new rulemaking section.

[10] *Hearing on S. 3201 before the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. 130-31 (1970).

[11] *Id.* at 349 (Prof. Milton H. Handler); 238-39, (Gilbert H. Weil, General Counsel, Ass'n of Nat'l Advertisers). *But see Id.* at 137 (Richard D. Barger, Nat'l Ass'n of Ins. Commissioners); 320 (Edward Dunkelberger, General Counsel, Nat'l Canners Ass'n) for the view that Section 106 granted a preemptive power that would not otherwise exist. In fact, the courts generally have held that a delegation of substantive rulemaking authority does include the power to preempt conflicting state laws: *See, e.g., Free* v. *Bland*, 369 U.S. 663 (1962); *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 143 (1963); *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956); *Mahon* v. *Stowers*, 416 U.S. 100 (1974); and *Sperry* v. *Florida* ex rel. Florida State Bar, 373 U.S. 379, 387-98 (1963).

[12] The bill (with Section 106 intact) was reported back to the Senate by the Judiciary Committee on October 5, 1970, but with no written report or recommendations, and Congress adjourned without acting on it.

[13] S. 986, 92nd Cong., 1st Sess., Title II (1971).

[14] There was also a change which removed the requirement of cross-examination in hearings on proposed rules.

[15] The Commerce Committee simply reported that it was "[n]ot the Committee's intent in expanding the jurisdiction of the Commission" to make the FTC the sole consumer protection agency, and that "State and local consumer protection efforts are not to be supplanted by this expansion of jurisdiction." S. Rep. No. 92-269, 92nd Cong., 1st Sess. 23 (1971).

[16] "While the question as to whether Commission rules and orders supersede concurrent state action must be answered by a judgment upon the particular case a Federal Trade Commission Trade Regulation Rule under present law would be the controlling standard over any state regulation of the same subject matter to the extent of the Commission's jurisdiction and to the extent that there is an actual conflict between the two schemes of regulation." *Hearing on S. 986 before the Consumer Subcomm. of the Senate Comm. on Commerce*, 92nd Cong., 1st Sess. 65 (1971). The FTC memorandum also supported the position that the mere delegation of authority to the FTC had not excluded the states from the consumer protection field. *Id.* at 64.

[17] *Id.* at 76-78, 85 (Exchanges of Senator Cook and Gilbert H. Weil, General Counsel, Ass'n of Nat'l Advertisers).

[18] Senator Cook was the only objector. S. Rep. No. 92-269, 92nd Cong., 1st Sess. 62 (1971).

[19] *Id.* at 28.

[20] 117 Cong. Rec. 39,826 (1971).

[21] *Id.* at 39,835-36, 39,840. The Senate subsequently defeated Senator Hruska's proposal to delete the rulemaking section of the bill. *Id.* at 39,850.

[22] The House Commerce Committee had been considering a similar bill, H.R. 4809, but (perhaps because the Senate hearings and report had already been made availa-

Footnotes continued on next page

were introduced early in the 93rd Congress and these were the bills which eventually became the Magnuson-Moss Act. The process by which the final legislation was produced is somewhat complex, but all the available evidence suggests that the congressional intent concerning preemption was just what it had been in the previous two Congresses.

The rulemaking section of the Senate bill, S. 356, was identical to the reported version of the bill that had been considered in the 92nd Congress, except that a new section on preemption had been added to make explicit the intent expressed in the earlier debates and Committee reports. The new section provided:

(2)(vii) Whenever the Commission determines in a rulemaking proceeding pursuant to paragraph (g)(2) that uniformity in the engagement of any act or practice in compliance with a rule issued pursuant to paragraph (g)(2) is in the public interest and necessary to carry out the intent of this Act, the Commission shall include in such rule a description of the extent to which such rule preempts State and local requirements relating to the same acts or practices affected by the Commission's rule. The reasons for preemption, or lack thereof, including the extent of consideration given to the need for uniformity shall be set forth in the rule with specificity.[23]

No explanation was given for making this preemptive authority explicit rather than implicit (as had been done in the 92nd Congress).

However, while the bill was being considered by the Commerce Committee, the Commission was litigating the issue of its substantive rulemaking authority under Section 6(g) of the Federal Trade Commission Act.[24] The new FTC Chairman, Lewis A. Engman, was concerned that the rulemaking procedures being considered by Congress would be too burdensome and preferred to wait and try to establish the FTC's existing rulemaking authority in the pending litigation, so the Commission reversed its earlier position and opposed the congressional affirmation of its rulemaking powers.[25] Subsequently, the Commerce Committee reported the bill out with the entire rulemaking section (including the preemption provision) deleted.[26] However, the Committee reports pledged to reintroduce the legislation in the event the courts ruled against the FTC, and explicitly stated that "the deletion of rulemaking powers by the committee is not to be read in any way as a reversal of the Senate's position in the 92nd Congress. * * *"[27]

Meanwhile, the House had been considering a bill[28] patterned after the 92nd Congress proposals. Like those proposals, the bill gave the Commission rulemaking authority without any specific language on preemption, but (also like those proposals) the intent seems to have been that the rulemaking authority included the power to preempt conflicting state laws. The Committee hearings on the bill showed that this was assumed to be the case,[29] and the Committee's report confirms it. The report repeated the position that the expansion of the Commission's power to "in or affecting interstate commerce" was not intended to exclude states from the consumer protection field,[30] then went on to say:

Where cases of consumer fraud of a local nature which affect commerce are being effectively dealt with by State or local government agencies, it is the Committee's intent that the Federal Trade Commission should not intrude.[31]

Subchapter D of Chapter 1 of Title 16 of the Code of Federal Regulations is amended by adding Part 456 to read as follows:

Sec.
456.1 Definitions.
456.2 Private conduct.
456.3 Public restraints.
456.4 Conformance to State law.
456.5 Permissible State limitations.
456.6 Private restraints.
456.7 Separation of examination and dispensing.
456.8 Federal or State employees.
456.9 Declaration of Commission intent.

AUTHORITY: 38 Stat. 717, as amended (15 U.S.C. 41, *et seq.*).

§ 456.1 Definitions.

A *"buyer"* is any person who has had an eye examination.

The *"dissemination of information"* is the use of newspapers, telephone directories, window displays, signs, television, radio, or any other medium to communicate to the public any information, including information concerning the cost and availability of a product or service.

An *"eye examination"* is the process of determining the refractive condition of a person's eyes or the presence of any visual anomaly by the use of objective or subjective tests.

"Ophthalmic goods" consists of eyeglasses, or any component of eyeglasses and contact lenses.

"Ophthalmic services" are the measuring, fitting, and adjusting of ophthalmic goods to the face subsequent to an eye examination.

A *"person"* means any party over which the Federal Trade Commission has jurisdiction. This includes individuals, partnerships, corporations, and professional associations.

A *"prescription"* is the written specifications for ophthalmic lenses which are derived from an eye examination. The prescription shall contain all of the information necessary to permit the buyer to obtain the necessary ophthalmic goods from the seller of his choice. In the case of a prescription for contact lenses, the refractionist must include in the prescription only those measurements and directions which would be included in a prescription for spectacle lenses. All prescriptions shall include all the information specified by state law, if any.

Footnotes continued from last page
ble) there was little discussion of the preemptive effect of the FTC rules. The only reference to the issue is a statement by an opponent that the bill would allow the FTC to "promulgate national 'rules' which will have the effect of voiding the laws of the various states." *Hearings on H.R. 4809 before the Subcomm. on Commerce & Finance of the House Comm. on Interstate & Foreign Commerce*, 92nd Cong., 1st Sess. 456 (1971) (Statement of the American Advertising Federation).

[23] 119 Cong. Rec. 972 (1973). An additional provision allowed the Commission, on the petition of a state or local government, to exempt individual state or local laws from such preemption.

[24] The District Court had ruled that the FTC had no substantive rulemaking power. *National Petroleum Refiner's Ass'n* v. *FTC*, 340 F. Supp. 1343 (D.D.C. 1972). At the opening of the 93rd Congress, the FTC was appealing this decision to the Court of Appeals. The decision was subsequently reversed.

[25] 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). Letter of March 26, 1973; S. Rep. No. 93-151, 93rd Cong., 1st Sess. 57-58 (1973).

[26] No hearings had been held on the bill, and comments had been solicited and received only from the FTC. S. Rep. No. 93-151, 93rd Cong., 1st Sess. 53 (1973).

[27] *Id.* at 32. The bill was subsequently passed by the Senate in this form.

[28] H.R. 20, 93rd Cong., 1st Sess. (1973).

[29] The following exchange is illustrative:

"Mr. Vaughan: The proposals would further allow the Federal Trade Commission to adopt rules 'defining with specificity acts or practices which are unfair or deceptive to consumers' which could and, in all certainty, would vitiate the laws of the States. Constitutional questions aside, we do not believe it desirable to vest any Federal administrative agency with such unbridled quasilegislative power as to upset the laws of the States without a congressionally approved specific statute establishing an overriding Federal interest in each restricted area of allowable agency activity."

"Subcommittee Chairman Moss: Would you not agree that the rulemaking to which you refer in your statement is now going forward under the existing authority of the Federal Trade Commission and would be unaffected if Congress takes no further action? * * *"

"Mr. Higginbotham: That is right, Mr. Chairman * * * *Hearings on H.R. 20 before the Subcomm. on Commerce & Finance of the House Comm. on Interstate & Foreign Commerce*, 93rd Cong., 1st Sess. 202, 217 (1973) (Walter W. Vaughan, Consumer Bankers Ass'n; Mr. Higginbotham, Legislative Counsel for the Ass'n answered for Mr. Vaughan.) *See also, Id.* at 235 (Robert B. Norris, Nat'l Consumer Finance Ass'n), 250-51 (James Smith, American Bankers Ass'n), 317 (American Advertising Federation), and 345 (Sears, Roebuck & Co.)."

[30] "The expansion of the FTC's jurisdiction * * * is not intended to occupy the field or in any way to preempt state of local agencies from carrying out consumer protection or other activities within their jurisdiction which are also within the expanded jurisdiction of the Commission." H.R. Rep. No. 93-1107, 93rd Cong., 2d Sess. 45 (1974).

[31] *Id.*

A *"refractionist"* is any Doctor of Medicine, Osteopathy or Optometry or any other person authorized by state law to perform eye examinations.

A *"seller"* is any person, or his employee or agent, who sells or provides ophthalmic goods and services directly to the public.

§ 456.2 Private conduct.

(a) (1) It is an unfair act or practice for sellers to fail to disseminate information concerning ophthalmic goods and services notwithstanding state or local law to the contrary. *Provided:* Violation of this subpart by any seller acting alone shall not be deemed to be a violation of section 5(a)(1) of the Federal Trade Commission Act.

(2) To prevent this unfair act or practice, any seller may engage in the dissemination of information concerning ophthalmic goods and services subject to the limitations expressed in § 456.5 below.

(b) (1) It is an unfair act or practice for refractionists to fail to disseminate information concerning eye examinations notwithstanding state or local law to the contrary. *Provided:* Violation of this subpart by any refractionist acting alone shall not be deemed to be a violation of section 5(a)(1) of the Federal Trade Commission Act.

(2) To prevent this unfair act or practice, any refractionist may engage in the dissemination of information concerning eye examinations. Nothing in this subpart shall excuse a refractionist from compliance with any state or local law which permits the dissemination of information concerning eye examinations, including information on the cost and availability of those examinations, but requires that specified affirmative disclosures also be included.

§ 456.3 Public restraints.

It is an unfair act or practice under section 5 of the Federal Trade Commission Act for any state of local governmental entity or any subdivision thereof, state instrumentality, or state or local governmental official to enforce any:

(a) Prohibition, limitation or burden on the dissemination of information concerning ophthalmic goods and services by any seller or group of sellers, or

(b) Prohibition, limitation or burden on the dissemination of information concerning eye examinations by any refractionist. *Provided:* Nothing in subparagraph (b) shall be construed to prohibit the enforcement of a state or local law which permits the dissemination of information concerning eye examinations, including information on the cost and availability of those examinations, but requires that specified affirmative disclosures also be included.

Violation of subparagraphs (a) and (b) shall not be deemed for purposes of section 5(m)(1)(A) or section 19 of the Federal Trade Commission Act to be a violation of section 5(a)(1) of the Act.

§ 456.4 Conformance to State law.

It is an unfair act or practice under section 5 of the Federal Trade Commission Act:

(a) For any seller to reduce, limit, or burden the dissemination of information concerning ophthalmic goods and services in order to comply with any law, rule, regulation or code of conduct of any nonfederal legislative, executive, regulatory or licensing entity or any other entity or person, which would have the effect of prohibiting, limiting, or burdening the dissemination of this information, or

(b) For any refractionist to reduce, limit, or burden the dissemination of information concerning eye examinations in order to comply with any law, rule, regulation or code of conduct of any nonfederal legislative, executive, regulatory or licensing entity or any other entity or person, which would have the effect of prohibiting, limiting, or burdening the dissemination of this information. *Provided:* To the extent that a state or local law, rule, or regulation permits the dissemination of information concerning eye examinations, including information on the cost and availability of those examinations, compliance with that law or regulation shall not be construed to reduce, limit or burden the dissemination of information concerning eye examinations.

§ 456.5 Permissible State limitations.

(a) To the extent that a state or local law, rule, or regulation requires that any or all of the following items be included within any dissemination of information concerning ophthalmic goods and services, such a law, rule, or regulation shall not be considered to prohibit, limit, or burden the dissemination of information:

(1) Whether an advertised price includes single vision and/or multifocal lenses;

(2) Whether an advertised price for contact lenses refers to soft and/or hard contact lenses;

(3) Whether an advertised price for ophthalmic goods includes an eye examination;

(4) Whether an advertised price for ophthalmic goods includes all dispensing fees; and

(5) Whether an advertised price for eyeglasses includes both frames and lenses.

(b) Where a state or local law, rule or regulation applies to all retail advertisements of consumer goods and services (including a law, rule, or regulation which requires the affirmative disclosure of information or imposes reasonable time, place and manner restrictions), such a law, rule, or regulation shall not be considered to prohibit, limit, or burden the dissemination of information.

(c) If, upon application of an appropriate state or local governmental agency, the Commission determines that any additional requirement of any such state or local governmental agency deemed by that agency to be necessary to prevent deception or unfairness is reasonable and does not unduly burden the dissemination of information, then that requirement shall be permitted to the extent specified by the Commission.

§ 456.6 Private restraints.

(a) It is an unfair act or practice for any person, other than a state or a political subdivision or agency thereof, to prohibit, limit or burden:

(1) The dissemination of information concerning ophthalmic goods and services by any seller;

(2) The dissemination of information concerning eye examinations by any refractionist. *Provided:* Nothing in this subpart shall be construed to prohibit any person from imposing reasonable affirmative disclosure requirements on the dissemination of information concerning eye examinations.

(b) Any organization or association which is not composed primarily of sellers and/or refractionists, which adopts or enforces self-regulatory guidelines for the dissemination of information which apply to all retail advertisements of consumer goods and services, shall not be deemed to be in violation of this subpart.

(c) The conditioning of membership in a professional or trade association of sellers or refractionists on a requirement that members or prospective members of that association not engage in the dissemination of information concerning ophthalmic goods and services and eye examinations or a requirement that ophthalmic goods and services be advertised only in a prescribed manner shall be deemed to prohibit, limit or burden the dissemination of that information.

§ 456.7 Separation of examination and dispensing.

In connection with the performance of eye examinations, it is an unfair act or practice for a refractionist to:

(a) Fail to give to the buyer a copy of the buyer's prescription immediately after the eye examination is completed. *Provided:* A refractionist may refuse to give the buyer a copy of the buyer's prescription until the buyer has paid for the eye examination but only if that refractionist would have required immediate payment from that buyer had the examination revealed that no ophthalmic goods were required;

(b) Condition the availability of an eye examination to any person on a requirement that that person agree to purchase any ophthalmic goods from the refractionist;

(c) Charge the buyer any fee in addition to the refractionist's examination fee as a condition to releasing the prescription to the buyer. *Provided:* A refractionist may charge an additional fee for verifying ophthalmic goods dispensed by another seller when the additional fee is imposed at the time the verification is performed; or

(d) Place on the prescription, or require the buyer to sign, or deliver to the buyer a form or notice waiving or disclaiming the liability or responsibility of the refractionist for the accuracy of the eye examination or the accuracy of the ophthalmic goods or services dispensed by another seller.

§ 456.8 Federal or State employees.

Nothing in this part shall be construed to prohibit any federal, state or local governmental entity from adopting and enforcing standards or requirements concerning the dissemination of information and release of prescriptions by sellers or refractionists employed by those governmental entities.

§ 456.9 Declaration of Commission intent.

(a) (1) It is the purpose of this part to allow retail sellers of ophthalmic goods and services to disseminate information concerning those goods and services in a fair and nondeceptive manner to prospective purchasers. This part is intended to eliminate certain restraints, burdens, and controls imposed by state and local governmental action as well as by private action on the dissemination of information, including advertising, concerning ophthalmic goods and services.

(2) It is the intent of the Commission that this part shall preempt all state and local laws, rules, or regulations that are repugnant to this part, and that would in any way prevent or burden the dissemination of information by retail sellers of ophthalmic goods and services to prospective purchasers, except to the extent specifically permitted by this part. All state or local laws, rules, or regulations which burden the dissemination of information by requiring affirmative disclosures specifically addressed to ophthalmic goods and services are preempted, except for those specifically permitted by this part. State and local laws, rules, or regulations which apply to advertising of all consumer goods and services, including those that require affirmative disclosure of information, are not preempted.

(b) It is the Commission's intent that state laws which do not permit refractionists to disseminate information concerning eye examinations, including information concerning the cost and availability of those examinations, be preempted. State and local laws, rules or regulations which require affirmative disclosure of information in all disseminations of information concerning eye examinations are not preempted.

(c) The Commission intends this part to be as self-enforcing as possible. To that end, it is the Commission's intent that this part may be used, among other ways, as a defense to any proceeding of any kind which may be brought against any retail seller of ophthalmic goods and services or refractionist who advertises in a nondeceptive and fair manner.

(d) It is not the Commission's intent to compel any seller or refractionist to disseminate information by virtue of this part. On the contrary, the provisions of this part are intended solely for the protection of those sellers and refractionists who want to disseminate information but have been restrained or prevented from advertising due to the prohibitions and restrictions of state and local laws and regulations, or be private action.

(e) In prohibiting the use of waivers and disclaimers of liability in § 456.7(d), it is not the Commission's intent to impose liability on a refractionist for the ophthalmic goods and services dispensed by another seller pursuant to that refractionist's prescription.

(f) In this part, the Rule, each subparagraph, and the Declaration of Commission Intent and their application are separate and severable.

By direction of the Commission dated May 24, 1978.

JAMES A. TOBIN,
Acting Secretary.

[FR Doc. 78-15353 Filed 6-1-78; 8:45 am]

[4110-03]

Title 21—Food and Drugs

CHAPTER I—FOOD AND DRUG ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SUBCHAPTER C—DRUGS: GENERAL

[Docket No. 76P-0071]

PART 207—REGISTRATION OF PRODUCERS OF DRUGS AND LISTING OF DRUGS IN COMMERICAL DISTRIBUTION

Notification of Registrant; Drug Establishment Registration Number and Drug Listing Number

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: This document amends the drug regulations to permit reuse, after a specified time period, of the product code segment of a National Drug Code (NDC) number when a drug product is discontinued and to permit the omission of leading zeros from the numeric character code when an NDC number is used in the labeling of small containers. The amendment also indicates a change in the conditions that require the use of a new NDC number for a drug product. This action is based on a proposal that was issued in response to a petition by the Pharmaceutical Manufacturers Association. These revisions are intended to extend the usefulness of the present coding system, encourage voluntary use of the NDC number on labels of small containers, and clarify the changes in conditions requiring a new NDC number for a drug product.

EFFECTIVE DATE: July 3, 1978.

FOR FURTHER INFORMATION CONTACT:

Mary Cooper, Bureau of Drugs (HFD-315), Food and Drug Administration, Department of Health, Education, and Welfare, 8757 Georgia Avenue, Room 1316, Silver Spring, Md. 20910, 301-427-8170.

SUPPLEMENTARY INFORMATION: In the FEDERAL REGISTER of April 28, 1976 (41 FR 17754), the Commissioner of Food and Drugs proposed to amend: § 207.35(b)(2)(ii) (21 CFR 207.35(b)(2)(ii)) to permit the reuse of the product code of a discontinued drug product; § 207.35(b)(3)(iv) (21 CFR 207.35(b)(3)(iv)) to permit the omission of leading zeros when the NDC number is imprinted directly on dosage forms or when a container is too small or otherwise unable to accommodate a label containing both required and optional labeling information; and § 207.35(b)(4) (21 CFR 207.35(b)(4)) to indicate a change in the conditions that require the use of a new NDC number for a drug product. The proposal was published in response to a petition submitted to the Food and Drug Administration (FDA) by the Pharmaceutical Manufacturers Association. Interested persons were invited to submit comments on the proposal on or before June 28, 1976.

After reexamining Part 207, the Commissioner has determined that the language providing for the reuse of a product code, originally proposed as a revision of § 207.35(b)(2)(ii), should be included in § 207.35(b)(4) instead. The Commissioner believes that paragraph (b)(4) of § 207.35, which pertains to the assignment of new NDC numbers by registrants to drug products, is the more appropriate paragraph. Also, the Commissioner advises that, for clarity, he is adding an-